

No. 14537

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**United States**  
**Court of Appeals**  
for the Ninth Circuit

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UNITED STATES OF AMERICA for the Use of  
WESTINGHOUSE ELECTRIC SUPPLY  
COMPANY, a Corporation,

Appellant,

vs.

JOHN V. AHEARN, SR., an Individual Doing  
Business Under the Firm Name and Style of  
Ahearn Electric Company and THE AETNA  
CASUALTY AND SURETY COMPANY, a  
Corporation,

Appellees.

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**Transcript of Record**

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**Appeal from the United States District Court for the  
Western District of Washington,  
Northern Division.**

**FILED**

**JAN 7 1955**



No. 14537

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

EVANS, McLAREN, LANE, POWELL and  
BEEKS,

Attorneys for Appellant,

1111 Dexter Horton Bldg.,  
Seattle, Washington.

HOOF, SHUCKLIN and HARRIS,

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533 Dexter Horton Bldg.,  
Seattle, Washington.

MERRILL WALLACE,

Attorney for Appellee,

Medical Dental Bldg.,  
Bremerton, Washington.



In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision

No. 3597

UNITED STATES OF AMERICA, for the Use  
of Westinghouse Electric Supply Company, a  
Corporation, and All Similarly Situated,

Plaintiff,

vs.

JOHN V. AHEARN, SR., an Individual Doing  
Business Under the Firm Name and Style of  
Ahearn Electric Company, and THE AETNA  
CASUALTY AND SURETY COMPANY, a  
Corporation,

Defendants.

## COMPLAINT

For cause of action against the defendants, plain-  
tiff alleges:

### I.

Westinghouse Electric Supply Company is now  
and was at all times hereinafter mentioned a corpo-  
ration organized and existing under and by virtue  
of the laws of the State of Delaware and a citizen  
thereof, authorized to do and transact business in  
the State of Washington, and that it has paid all  
license fees due said state.

### II.

That the defendant, John V. Ahearn, Sr., is now  
and at all times hereinafter mentioned was a resi-

dent of the State of Washington, doing business under the firm name and style of Ahearn Electric Company in Bremerton, which is located in the Western District of the State of Washington, Northern Division. That the defendant, The Aetna Casualty and Surety Company, is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Connecticut and is a citizen thereof and is duly authorized and licensed to engage in the surety business in the State of Washington.

### III.

That on February 8, 1952, the defendant John V. Ahearn, Sr., an individual trading as and doing business under the firm name and style of Ahearn Electric Company in the City of Bremerton, State of Washington, hereinafter called "contractor," entered into a contract (Contract No. NOY28688) with the United States of America, through the Civil Engineer Corps, United States Navy for Chief of Bureau of Yards and Docks, as the contracting officer, by which the contractor agreed:

"The contractor shall furnish the materials and perform the work for major repairs to electrical distribution, Quarters Area at the Puget Sound Naval Shipyard, Bremerton, Washington, complete and ready for use for the consideration of \$58,138.85, in strict accordance with the specifications, schedules, and



drawings, all of which are made a part of Specification No. 30338.”

That said contractor as principal and the defendant, The Aetna Casualty and Surety Company, as surety, under date of February 8, 1952, furnished a payment bond to the United States of America in the sum of \$29,069.43, conditioned that:

“If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.”

That said bond was required under the contract above referred to and the statutes of the United States, being Title 40, U.S.C.A., Secs. 270a, 270b, and 270c.

#### IV.

That on or about March 11, 1952, the defendant, John V. Ahearn, Sr., an individual trading as and doing business under the firm name and style of Ahearn Electric Company, purchased from Westinghouse Electric Supply Company for use in performing and fulfilling said contract, a quantity of Latex insulated, lead covered, telephone cable, which said contractor used in the prosecution of the work provided in said contract with the United States of

America above referred to. That all of said telephone cable was delivered and furnished by said Westinghouse Electric Supply Company to said contractor in December, 1952, and one year has not expired after the date of the final settlement of said contract above referred to entered into between said United States of America and said contractor.

## V.

That there is a balance due, owing and unpaid to Westinghouse Electric Supply Company of the sum of \$5,469.51, on account of said materials furnished by Westinghouse Electric Supply Company to said John V. Ahearn, Sr., an individual trading as Ahearn Electric Company which were used in the prosecution of the work provided in said contract above referred to.

## VI.

That Westinghouse Electric Supply Company has no knowledge of any other suit or action having been brought on the bond herein above referred to and that this suit is brought by Westinghouse Electric Supply Company in its own behalf and also for all other persons who have furnished labor or material in the prosecution of the work provided for in the contract above referred to, who have not been paid in full therefor before the expiration of a period of 90 days after the date on which the last of the labor was done or performed by them or material was furnished or supplied by them, for which claim is made.

VII.

That the Westinghouse Electric Supply Company has incurred an expense of \$7.00 in obtaining certified photostatic copies of the contract and bond hereinabove referred to. That Westinghouse Electric Supply Company is entitled to be allowed a reasonable attorneys' fee to be fixed by the court, together with its costs and expenses in prosecuting this action and that the sum of \$650.00 is a reasonable sum to be allowed as attorneys' fees.

Wherefore, Westinghouse Electric Supply Company prays for judgment against the defendants, John V. Ahearn, Sr., an individual doing business under the firm name and style of Ahearn Electric Company, and The Aetna Casualty and Surety Company, a corporation, in the sum of \$5,469.51, together with interest at 6% per annum from January 1, 1953, until paid, together with \$650.00 attorneys' fees, \$7.00 cost for obtaining certified copies of contract and bond, and for such other and further relief as to the court may seem just and equitable.

EVANS, McLAREN, LANE  
POWELL & BEEKS,

/s/ W. BYRON LANE,

/s/ RAYMOND W. HAMAN,

Attorneys for Westinghouse Electric Supply Company, Plaintiff.

[Endorsed]: Filed November 10, 1953.

[Title of District Court and Cause.]

### ANSWER

Comes now the defendants above named and in answer to plaintiff's Complaint, admit, deny and allege as follows:

#### I.

In answer to Paragraphs I and II admit the same.

#### II.

In answer to Paragraph III, admit that contract NOY 28688 was entered into according to the terms and conditions thereof, but not otherwise with the United States of America by defendant, Ahearn Electric Company, and that the defendant, Aetna Casualty & Surety Company, as surety, furnished a payment bond in connection therewith in accordance with the terms and conditions of said bond, but not otherwise, and deny each and every other allegation therein contained.

#### III.

In answer to Paragraph IV admit that this action was instituted within one year of the date of final settlement of the contract mentioned and deny each and every other allegation therein contained.

#### IV.

In answer to Paragraph V deny each and every allegation therein contained and especially deny that there is due and owing plaintiff the sum of Five Thousand Four Hundred Sixty-nine Dollars

and Fifty-one Cents (\$5,469.51) or any other sum or sums whatsoever.

V.

In answer to Paragraph VII deny each and every allegation therein contained and especially deny that the expenses therein alleged were reasonable or necessary and especially deny that the sum of Six Hundred and Fifty Dollars (\$650.00) and costs or any other sum or sums whatsoever is a reasonable sum to be allowed plaintiff.

Wherefore, having fully answered defendants pray that plaintiff's Complaint be dismissed and that they have and recover their costs and disbursements herein.

HILE, HOOFF & SHUCKLIN,

By /s/ CLIFFORD HOOFF,

Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 28, 1954.

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[Title of District Court and Cause.]

MOTION FOR ORDER AMENDING  
COMPLAINT

Comes now the plaintiff and through its attorneys, Evans, McLaren, Lane, Powell and Beeks, moves the above-entitled court for an order permitting the plaintiff to file an amendment to its complaint filed herein, as follows:

That the last sentence in Paragraph VII, of plaintiff's complaint be amended to read:



“That Westinghouse Electric Supply Company is entitled to be allowed a reasonable attorneys’ fee to be fixed by the court, together with its costs and expenses in prosecuting this action and that the sum of \$1,500.00 is a reasonable sum to be allowed as attorneys’ fees.”

Also, that the prayer be amended accordingly.

EVANS, McLAREN, LANE,  
POWELL & BEEKS,  
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 16, 1954.

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[Title of District Court and Cause.]

#### NOTICE OF PRESENTATION OF MOTION

To John V. Ahearn, Sr., Defendant herein, and to  
Clifford Hoof, his Attorney:

You Are Hereby Notified that at the commencement of the trial of the above-entitled action, now set for trial on June 15, 1954, we will present to the Court for its ruling the attached motion to amend plaintiff’s complaint herein.

EVANS, McLAREN, LANE,  
POWELL & BEEKS,  
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 16, 1954.

[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION OF ORAL  
DECISION AND ALTERNATIVE MOTION  
FOR NEW TRIAL

Comes now Plaintiff and respectfully moves the above-entitled Court that it reconsider its oral decision rendered at the conclusion of the trial for the reason that it is contrary to the evidence and the law of the case.

In the alternative, and without waiving the above motion, plaintiff moves for a new trial.

EVANS, McLAREN, LANE,  
POWELL & BEEKS,

/s/ W. BYRON LANE,  
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 23, 1954.

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[Title of District Court and Cause.]

ORDER DENYING MOTION FOR RECONSID-  
ERATION OF ORAL DECISION AND  
DENYING MOTION FOR NEW TRIAL

The plaintiff's Motion for Reconsideration of Oral Decision and in the Alternative for a New Trial coming on regularly for hearing before the Honorable J. C. Bowen, United States District Judge

of the above-entitled court on the First day of July, 1954, plaintiff being present by W. Byron Lane, one of its counsel, defendants being present by Clifford Hoof, one of their counsel; the court having considered the Motion of the plaintiff and being satisfied that the same should be denied, Now, Therefore be it,

Ordered that plaintiff's Motion for Reconsideration of this court's oral decision in the above-entitled cause and in the alternative for the granting of a new trial be, and the same is, denied in whole.

Done in Open Court this 2nd day of August, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ CLIFFORD HOOF,

Attorney for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 2, 1954.



[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having come on regularly for trial before the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington, Northern Division, sitting without a jury, on the 16th day of June, 1954, the plaintiff being present by W. Byron Lane, Esq., of Evans, McLaren, Lane, Powell & Beeks, attorneys for plaintiff; the defendant, John V. Ahearn, Sr., appearing in person and by Clifford Hoof, Esq., of Hile, Hoof & Shucklin, and Merrill E. Wallace, Esq., attorneys for said defendant; the defendant, The Aetna Casualty and Surety Company, a corporation, appearing by Clifford Hoof, Esq., of Hile, Hoof & Shucklin, and Merrill E. Wallace, Esq., attorneys for said defendant. Evidence having been introduced on behalf of the plaintiff and on behalf of the defendants, and the plaintiff and the defendants having rested, the Court having heard the argument of counsel and being fully advised in the premises now, therefore makes the following:

### Findings of Fact

#### I.

Westinghouse Electric Supply Company is now and was at all times hereinafter mentioned a corporation organized and existing under and by virtue

of the laws of the State of Delaware and a citizen thereof, authorized to do and transact business in the State of Washington, and that it has paid all license fees due said state.

## II.

That the defendant, John V. Ahearn, Sr., is now and at all times hereinafter mentioned was a resident of the State of Washington, doing business under the firm name and style of Ahearn Electric Company in Bremerton, which is located in the Western District of the State of Washington, Northern Division. That the defendant The Aetna Casualty and Surety Company is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Connecticut and is a citizen thereof and is duly authorized and licensed to engage in the surety business in the State of Washington.

## III.

That on February 8, 1952, the defendant John V. Ahearn, Sr., an individual trading as and doing business under the firm name and style of Ahearn Electric Company in the City of Bremerton, State of Washington, hereinafter called "contractor," entered into a contract (Contract No. NOY29688) with the United States of America, through the Civil Engineer Corps, United States Navy for Chief of Bureau of Yards and Docks as the contracting officer, by which the contractor agreed: .

"The contractor shall furnish the materials and perform the work for major repairs to

electrical distribution, Quarters Area at the Puget Sound Naval Shipyard, Bremerton, Washington, complete and ready for use for the consideration of \$58,138.85, in strict accordance with the specifications, schedules, and drawings, all of which are made a part of Specification No. 30338.”

That the said contract referred to was introduced in evidence as plaintiff's Exhibit 18. That said contractor as principal and the defendant, The Aetna Casualty and Surety Company, as surety, under date of February 8, 1952, furnished a payment bond to the United States of America in the sum of \$29,069.43, conditioned that:

“If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereinafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.”

#### IV.

That the payment bond mentioned in the last preceding paragraph executed by the defendant, John V. Ahearn, Sr., as principal, and The Aetna Casualty and Surety Company, as surety, was executed in accordance with the terms and provisions of what is known as the “Miller Act,” being Sec.

270a and 270b, of Title 40, U.S.C.A. That the action herein brought was commenced by the plaintiff within one year of the date of final settlement of the contract mentioned in the last preceding paragraph.

## V.

That the plaintiff's cause of action and evidence introduced in support thereof was for the purpose of collecting from the defendants the principal sum of (\$5,469.51) five thousand four hundred and sixty-nine dollars and fifty-one cents alleged to be due from the defendant, John V. Ahearn, Sr., for materials furnished by plaintiff to the defendant, John V. Ahearn, Sr., for performance of the work contemplated under the said contract heretofore mentioned. That the principal amount involved in this action constitutes the difference in price between paper covered lead sheathed telephone cable and latex covered lead sheathed telephone cable; the latter being a higher priced type of telephone cable. That the general specifications for the work to be performed under the contract hereinafter mentioned permitted the use of either type of telephone cable.

## VI.

That on or about the 31st day of January, 1952, plaintiff furnished to the defendant John V. Ahearn, Sr., a quotation on various electrical materials at the request of said defendant for the purpose of the said defendant John V. Ahearn, Sr., bidding on the contract hereinbefore referred to. That the bid opening was at 2:00 p.m., February 1,

1952, at Seattle, Washington. That said quotation was introduced in evidence herein as plaintiff's Exhibit No. 3. That the said quotation with reference to telephone cable includes the following language:

“Shipment telephone cable, third quarter, 1953, prices billed will be those in effect at time of shipment. Orders on telephone cable should be placed direct with Graybar Electric Company, Seattle.” [The following appeared as an alteration on the original]: which last quoted statement is made with reference to paper covered telephone cable. [Initialed]: J.C.B.

That the testimony of the defendant Ahearn, which testimony was denied by plaintiff was that Merritt Upson, salesman for plaintiff, advised defendant Ahearn that the paper wrapped lead sheathed telephone cable could be obtained for defendant Ahearn in time for defendant Ahearn to complete his contract if he were successful in his bid, providing the entire order for electrical materials including telephone cable were placed directly with plaintiff corporation. The testimony of defendant Ahearn was that as a result of such representations he bid on work based on paper wrapped lead sheathed cable. That defendant Ahearn was a successful bidder on said work and on the 5th day of February, 1952, said Merritt Upson, salesman for plaintiff and acting upon behalf of plaintiff, took at defendant Ahearn's place of business at Bremerton, Wash-



ington a written order signed by defendant John V. Ahearn, Sr., for electrical materials to perform said contract, included in which was paper covered lead sheathed telephone cable. That said order was introduced in evidence as plaintiff's Exhibit No. 4 and the said order was accepted by plaintiff. That the said order, Exhibit No. 4, is the only document signed by the defendant John V. Ahearn, Sr., in connection with any orders for materials from the plaintiff corporation. That the said order did not include any order for latex covered lead sheathed telephone cable.

#### VII.

That the time for completion of the contract of the defendant John V. Ahearn, Sr., was in the month of August, 1952,

#### VIII.

In support of plaintiff's cause of action the plaintiff introduced the testimony of Merritt Upson, salesman for the plaintiff, who dealt with the defendant John V. Ahearn, Sr., the testimony of Edward Novich, an employee of the plaintiff, the testimony of Arthur L. Rockwell, an employee of defendant Ahearn on the work in question, who acted in the capacity on the work in question as foreman, and the testimony of Lawrence B. Blackman, likewise an employee of defendant Ahearn in support of the contention on the part of the plaintiff that the defendant John V. Ahearn, Sr., on the 10th day of March, 1952, ordered a change from paper covered lead sheathed telephone cable to latex

covered lead sheathed telephone cable at an increase in price amounting to five thousand four hundred and sixty-nine dollars and fifty-one cents (\$5,469.51), the principal amount herein sued for. The defendant Ahearn denied that he had ordered such a substitution. The testimony of Mr. Rockwell was introduced by way of deposition as was the testimony of Mr. Blackman. In addition to the testimony, at the time of trial, of Mr. Upson and Mr. Novich, portions of the pre-trial depositions of said Merritt Upson and Edward Novich were likewise used at the time of trial, in cross-examination of each of said witnesses.

### IX.

That in the month of January, 1953, the plaintiff caused to be delivered to the defendant John V. Ahearn, Sr., at job site at the Bremerton Navy Yard, at Bremerton, Washington, latex covered lead sheathed telephone cable instead of paper wrapped lead sheathed telephone cable. That at the time of delivery of said cable the said completion date in connection with the performance of said contract by the said defendant Ahearn had been passed and the said latex covered cable was used to complete said work. That at or about the time of the delivery of said latex covered cable defendant Ahearn received from plaintiff an invoice for said latex covered cable which showed an increase in price over paper covered cable of the principal amount involved in this action. That the said increase in price and substitution of cable was protested by the defendant Ahearn prior to the use by

the defendant Ahearn of the substituted telephone cable.

### X.

That the defendant Ahearn was instructed by the contract officer of the U. S. Navy to proceed with the installation of the latex covered cable and no increase in contract price was given to the defendant Ahearn by its use and the defendant Ahearn did not benefit by such substitution.

### XI.

That this Court heretofore rendered its oral decision in this matter which is as follows, and is made a part of these Findings by the Court:

“From the standpoint of credibility and weight of testimony as among the several witnesses, this is one of the most perplexing cases submitted to this Court in recent times. Some one among the witnesses is obviously and knowingly not telling the truth, and I do not know who it is. There is too much conflict of testimony about the facts that should be clearly within the knowledge of these witnesses. There is no excuse for all this irreconcilability and positive conflict between the testimony of the various witnesses.

“We start out with the situation that the only contract or order bearing the definite signature of the defendant Ahearn is Plaintiff’s Exhibit 4, which was the original order and contract for this cable and which called for not the latex here in contro-



versy but paper-covered cable, which all agree was the subject of the original contract.

“Mr. Upson, the experienced salesman for plaintiff Westinghouse, claims to have received the latex-amending order direct from Mr. Ahearn, orally given by the latter, and that Mr. Upson did not take any signature for the substituted latex but wrote up a sort of field order form and later mailed a copy of it to Mr. Ahearn, the receipt of which Mr. Ahearn denies. Mr. Ahearn also denies he ever gave to Mr. Upson any order for the substituted latex cable.

“The testimony of Mr. Upson and Mr. Ahearn on whether or not Mr. Ahearn gave the order for a change from paper-covered to latex-covered cable is in direct conflict. Both are interested witnesses. One or the other of them is bound to be telling a falsehood and knows it. I cannot tell which one it is.

“Now, as to what importance the Court should attach to the testimony given by deposition by the witnesses Rockwell and Blackman, ordinarily one would suppose that they would have no motive to falsify. The fact is, however, that their testimony does not jibe with Mr. Upson’s testimony in several details and does not jibe with Mr. Ahearn’s testimony in other important details. There is the fact also that both of those witnesses seemed to have had an unfriendly critical attitude toward Mr. Ahearn. Irrespective of whether or not there was something

in the private or business life of Mr. Ahearn which justified to any extent such an attitude on the part of the witnesses Rockwell and Blackman, I believe their testimony was influenced by that attitude. I believe they were unfriendly witnesses, and I think the Court cannot rely upon their testimony to supply the missing link in the otherwise unconvincing testimony here on the plaintiff's side of this case.

“Since the parties placed enough importance on the original order to require it to be signed into express contract by the buyer Ahearn as well as the seller Westinghouse, it is not easy to see why it should not have been and was not just as important, if not more so, to have the buyer Ahearn sign the amending order substituting latex cable, in view of the fact that such substitution increased the originally agreed contract price by the substantial sum of \$5,469.51.

“The only convincing testimony which cannot be impaired in any way by other testimony now in the record is in defendants' favor and is Plaintiff's Exhibit 4 which is the original order and contract signed by Mr. Ahearn and which calls not for latex but for paper-covered cable. Other than that, all of the vitally material testimony in the case is so hopelessly in conflict and so obviously shows that some witness or witnesses have purposely, knowingly and wilfully falsified as to the material facts in this matter, that this Court can come to but one conclusion, and that is that the plaintiff in this case has failed to sustain the plaintiff's burden of proof

in support of the cause of action alleged in plaintiff's complaint.

"Plaintiff contends that, in any event, the evidence establishes an implied contract entitling plaintiff Westinghouse to a recovery against defendants. The defendant Ahearn, however, is not shown by the evidence to have received any greater benefit from the substitution of latex cable than he before the substitution had a contract right to receive from the use of paper-covered cable. Therefore, no implied contract liability is visited upon that defendant. No liability attaches to the surety defendant except as to liabilities of defendant Ahearn. The United States of America through the Navy Department is the only one whose position might be said to be better today by reason merely of the use on the job of latex instead of paper-covered cable, but no relief for or against the United States is sought here. In this action, plaintiff Westinghouse is not entitled to any recovery based on implied contract.

"It is the finding, conclusion and decision of this Court that the plaintiff take nothing by its complaint herein; that each party pay his and their own costs herein incurred; and that plaintiff's action be dismissed with prejudice."

(Interjection by Mr. Lane.)

"I am considering everything, and the Court's decision is now complete. I do not feel at liberty at this late hour to discuss it in any greater detail.

On all issues the Court decides in favor of the defendants because of lack of convincing proof and because the plaintiff has not sustained its burden of proof to establish the material allegations of the complaint by a preponderance of the evidence.”

Done in Open Court This 2nd day of August, 1954.

/s/ JOHN C. BOWEN,  
United States District Judge.

From the Foregoing Findings of Fact the Court  
Makes the Following Conclusions of Law:

I.

That no recovery of any kind should be allowed against the defendants, or either of them, based upon an express contract as alleged in plaintiff's complaint, nor upon implied contract.

II.

That plaintiff's complaint should be dismissed with prejudice as to the defendants and each of them.

III.

That each of the parties to this action should bear its or his own costs and disbursements.

Done in Open Court This 2nd day of August, 1954.

/s/ JOHN C. BOWEN,  
United States District Judge.

Presented by:

/s/ CLIFFORD HOOFF,

One of the Defendants' Attorneys.

Receipt of Copy acknowledged.

[Endorsed]. Filed August 2, 1954.

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 3597

UNITED STATES OF AMERICA, for the Use  
of Westinghouse Electric Supply Company, a  
Corporation, and All Similarly Situated,

Plaintiff,

vs.

JOHN V. AHEARN, SR., an Individual Doing  
Business Under the Firm Name and Style of  
Ahearn Electric Company, and THE AETNA  
CASUALTY AND SURETY COMPANY, a  
Corporation,

Defendants.

JUDGMENT OF DISMISSAL  
WITH PREJUDICE

The above-entitled action having come on regularly for trial before the Honorable John C. Bowen,



Judge of the United States District Court for the Western District of Washington, Northern Division, sitting without a jury, on the 16th day of June, 1954, the plaintiff being present by W. Byron Lane, Esq., of Evans, McLaren, Lane, Powell & Beeks, attorneys for plaintiff; the defendant, John V. Ahearn, Sr., appearing in person and by Clifford Hoof, Esq., of Hile, Hoof & Shucklin, and Merrill E. Wallace, Esq., attorneys for said defendant; the defendant, The Aetna Casualty and Surety Company, a corporation, appearing by Clifford Hoof, Esq., of Hile, Hoof & Shucklin, and Merrill E. Wallace, Esq., attorneys for said defendant. Evidence having been introduced on behalf of the plaintiff and on behalf of the defendants, and the plaintiff and the defendants having rested, the Court having heard the argument of counsel and being fully advised in the premises, and having heretofore entered its Findings of Fact and Conclusions of Law, now, therefore, be it

Considered, Ordered and Adjudged that plaintiff's complaint be and it is hereby dismissed with prejudice and plaintiff take nothing thereby. Be it further,

Considered, Ordered and Adjudged that each of the parties hereto shall bear their own costs and disbursements.

Done in Open Court This 2nd day of August, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ CLIFFORD HOOFF,  
One of the Defendants'  
Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed August 2, 1954.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that United States of America, for the use of Westinghouse Electric Supply Company, a corporation, plaintiff herein, hereby appeals to the United States Court of Appeals for the 9th Circuit from the judgment entered in the above-entitled cause on or about August 2, 1954.

Dated at Seattle, Washington, this 30th day of August, 1954.

EVANS, McLAREN, LANE,  
POWELL & BEEKS,  
Attorneys for Plaintiff.

[Endorsed]: Filed August 30, 1954.

[Title of District Court and Cause.]

### STATEMENT OF POINTS

Comes Now the plaintiff-appellant, and states the following points upon which it will rely on appeal:

1. The court erred in its entry of findings of fact, conclusions of law and judgment of dismissal with prejudice of plaintiff's complaint.

2. The court erred in not entering a judgment in favor of appellant against the respondents as prayed for by plaintiff's complaint as amended.

3. The court erred in entering its order (minute entry of July 1, 1954, and written order of August 2, 1954) denying appellant's motion for reconsideration of court's oral decision and in the alternative for the granting of a new trial.

4. The court erred in finding and concluding in its Finding of Fact No. 10 that the appellee, John V. Ahearn, Sr., doing business as Ahearn Electric Company, was not liable to appellant for the cost of the latex telephone cable, sued for herein, under the theory of an implied contract, respondent having received from appellant and retained for his use the latex cable long after receiving the invoice therefor and with knowledge that the price of latex cable was \$5,469.59 (the amount sued for herein) more than the price for paper-wrapped cable quoted to him by the appellant.



5. The court erred in finding and concluding in its Finding of Fact No. 10 that the appellee did not benefit by the receipt of latex cable.

EVANS, McLAREN, LANE,  
POWELL & BEEKS,

/s/ W. BYRON LANE,

/s/ MARTIN P. DELETS, JR.

Receipt of copy acknowledged.

[Endorsed]: Filed September 24, 1954.

In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 3597

UNITED STATES OF AMERICA, for the Use  
of Westinghouse Electric Supply Company, a  
Corporation, and All Similarly Situated,

Plaintiff,

vs.

JOHN V. AHEARN, SR., an Individual Doing  
Business Under the Firm Name and Style of  
Ahearn Electric Company, and THE AETNA  
CASUALTY AND SURETY COMPANY, a  
Corporation,

Defendants.

## TRANSCRIPT OF PROCEEDINGS AT TRIAL

GEORGE F. SCHINDLER

called as a witness by and on behalf of plaintiff,  
having been first duly sworn, was examined and  
testified as follows:

### Direct Examination

By Mr. Lane: [15\*]

\* \* \*

Q. Mr. Schindler, you have been handed what  
has been marked Plaintiff's Exhibit 3. Would you  
state what that is, please, if you know?

---

\*Page numbering appearing at foot of page of original Reporter's  
Transcript of Record.

(Testimony of George F. Schindler.)

A. That is a copy of my quotation on this particular job in question involving electrical equipment.

Q. And what is the date of that quotation?

A. January 31, 1952.

Q. And what were the facts and circumstances surrounding your preparing that quotation?

A. This is a typical job that we are called upon—that I am called upon—to quote on as to prices for the electrical contractor. It involves the search of specifications and blueprints on the particular job, getting information as to the electrical equipment involved on the job, and obtaining pricing information on that equipment to transfer on to the electrical contractor. [18]

\* \* \*

Mr. Lane: I am reading now from page 3. [19] It is a quotation of approximately 1500 feet of telephone cable, 6 pair, 19 ga., paper wrapped, lead covered, Western Electric Type ENB. The price quoted is \$16.50 per 100.

The Court: \$16.50 per 100?

Mr. Lane: Yes. The other item is approximately 1500 feet of the same type of cable except 26 pair, and the price quoted is \$37.90 per 100. The third item is approximately 1500 feet of the same cable except it is 51 pair cable, and the price quoted is \$61.20.

The Court: Per 100?

Mr. Lane: Per 100. Then follows this follow-

(Testimony of George F. Schindler.)

ing language: "Shipment—Telephone Cable"—this is all telephone cable we are referring to, your Honor—"3rd Quarter 1953. Prices billed will be those in effect at time of shipment. Orders on Telephone Cable should be placed direct with Graybar Electric Company, Seattle." Then further down at the bottom of the page the following language appears: "All the above quantities not guaranteed."

\* \* \*

Q. Now, the specifications for this job provided for either this type of paper wrapped wire or latex wire, did it not? A. That is right.

Q. Were you requested to give a quotation on latex?

A. I do not recall having had a request on any particular type—that is, one or the other.

Q. Well, if you had had a request for a [23] quotation on latex, would there have been something in this quotation about that?

A. At this time, Mr. Lane, to my knowledge we did not have access to any telephone cable with latex covering. [24]

\* \* \*

Q. Were you requested by any one from the Ahearn Company to later supply figures on latex, do you recall?

A. No, sir. I was not requested to supply any figures after the original quotation.

Q. After you made up that quotation which is Exhibit 3, what did you do with it?

(Testimony of George F. Schindler.)

A. I think the record in the inside folder will show that it was mailed to the contractor on the 2nd of February, I believe was the date.

The Court: Is that statement made with reference to Plaintiff's Exhibit 3?

Mr. Lane: Yes, your Honor.

The Court: Read the answer.

(The last answer is read by the reporter.)

The Court: To the contractor? Do you mean the defendant Ahearn?

The Witness: Yes, sir.

The Court: What year was it?

The Witness: 1952.

The Court: You may inquire.

The Witness: I might add, also, Mr. Lane, that those prices, according to the information which I have on the job folder, indicate that I phoned this information on the 31st, January 31, 1952. [25]

Q. (By Mr. Lane): To the Ahearn Company?

A. That is right.

Q. And you don't recall to whom you talked?

A. No, sir.

Q. And then you mailed it on the following day, is that right? A. Yes. [26]

\* \* \*

(Testimony of George F. Schindler.)

Cross-Examination

By Mr. Hoof: [27]

\* \* \*

Q. Your Mr. Upson, who is an employee of the Westinghouse Electric Supply Company, did not confer with you prior to the time you prepared the quotation?

A. No, sir. I don't recall any conversation with him on this.

Q. Now, what was the reason, Mr. Schindler, of placing on the third page of Exhibit No. 3 the language [29] "Orders on Telephone Cable should be placed direct with Graybar Electric Company, Seattle"?

A. Well, Mr. Hoof, the reason that was put on there is this: At that time on telephone cable—I might first state that it was very seldom I quoted on telephone cable, and when I think of telephone cable I think of Graybar. That was our only source of supply at that time to my knowledge, and as such I contacted the Graybar Company to get a price on this cable for this particular job, and there was no commission in that for us. I was merely quoting this cable as a convenience to the contractor. Therefore, I stated on the bid which you read a while ago that as far as the order, if it should materialize into an order, it should be placed direct with the Graybar Company. There was no commission in it for us because of that type of



(Testimony of George F. Schindler.)

cable. Therefore, as a convenience to the contractor, I obtained the price, and due to the fact that there was no commission in it for us on this type of cable I made the statement that the order should be placed direct with Graybar Company. [30]

\* \* \*

### MERRITT UPSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

\* \* \*

Mr. Lane: I would like the record to show, your Honor, that Exhibit 3, which has just been offered—and has it been admitted?

The Court: I do not believe so. Is there any objection, Mr. Hoof? [31]

Mr. Hoof: No objection to Exhibit 3.

The Court: Plaintiff's Exhibit 3 is now admitted. [32]

\* \* \*

Q. (By Mr. Lane): What was your answer? I forget. Plaintiff's Exhibit 4 is what, Mr. Upson?

A. This is the original copy of an order that I wrote in Mr. Ahearn's place of business in Bremer-ton. [34]

Q. Under what date?                      A. February 5.

Q. Of what year?                              A. 1952.

(Testimony of Merritt Upson.)

Q. Did you go to Bremerton on that date?

A. Yes, sir.

Q. And you saw Mr. Ahearn at that time?

A. Yes, sir.

Q. And this was the order pertaining to these materials in connection with this contract?

A. Yes, sir. This was the first order.

\* \* \*

Q. And that was obtained from his office and written up by you in your handwriting, do I understand? A. Yes, sir.

Q. And then who is it signed by, if any one?

A. Mr. Ahearn.

Q. Now, does that refer to what type of telephone cable?

A. Paper-wrapped, lead-covered.

Q. Is there any reference in there at all to latex? [35] A. No, sir.

The Court: Will you wait just a moment? Do you ever recall Mr. Ahearn asking you instead of the paper-wrapped cable to furnish him on this purchase order latex-wrapped cable?

The Witness: Not at this time.

\* \* \*

Q. (By Mr. Lane): I hand you what has been marked Plaintiff's Exhibit 5 and ask you what that is, if you know.

A. Exhibit 5 is a rewrite on our order form of the Exhibit 4.

Q. And that was prepared by you?

(Testimony of Merritt Upson.)

A. Yes, sir.

Q. It covers the same items as in Exhibit 4? [36]

A. There may be a difference in item but it would be——

Q. Does it cover the same items generally that are in Exhibit 4?

A. Generally it covers the same items.

Q. After that was prepared, what was done with it, Mr. Upson?

A. This was mailed, or a copy was mailed, to Mr. Ahearn.

Q. By whom?

A. By myself.

\* \* \*

Mr. Lane: I would like the record to show, your Honor, that at the time Mr. Ahearn's deposition was taken he did not produce a copy of this Exhibit 5 and that the copy that is now in court as Exhibit 5 is from the Westinghouse file. I believe that is correct.

Mr. Hoof: Well, I think that as long as we are proceeding this way, on statements, may the record likewise show that no subpoena was issued in the production of records at the time of Mr. Ahearn's deposition. [37]

\* \* \*

Mr. Lane: All right. I would now like to offer both Exhibits 4 and 5 in evidence, your Honor.

The Court: Hearing no objection——

Mr. Hoof: There will be no objection to their admission.

The Court: Each of them is now admitted. [38]

\* \* \*

(Testimony of Merritt Upson.)

Q. (By Mr. Lane): There has been handed you Plaintiff's Exhibit No. 6. What is that, Mr. Upson?

A. That is a letter answering a request from the Ahearn Electric Company on deliveries of material orders for this job.

Q. And that was written by whom?

A. By myself.

The Court: Do those materials include this cable in question?

The Witness: That is right, sir.

Q. (By Mr. Lane): And it covers delivery dates, does it, on this cable in question and on latex, is that not correct?      A. Yes, sir.

Q. And you wrote that letter and handed it [41] to Mr. Ahearn, did you?

A. To the best of my knowledge I delivered it personally.

Q. On what date?      A. February 19.

Mr. Lane: I would like to offer that letter in evidence.

Mr. Hoof: I have no objection.

The Court: Plaintiff's Exhibit 6 is now admitted.

(Plaintiff's Exhibit No. 6 received in evidence.)

The Court: You may inquire.

Q. (By Mr. Lane): Would you read to the Court the language there pertaining to the delivery dates of paper-wrapped cable or latex cable?

(Testimony of Merritt Upson.)

A. Western Electric Telephone Wire, 6 pr., 26 pr. & 51 pr. paper and sheath, Third Quarter, 1953.

Q. That is the delivery date?

A. That is the delivery date, yes, sir. Do you want it on the latex?

Q. Yes.

A. U. S. Rubber Latex Telephone Wire 6 pr., 26 pr. [42] and 51 pr., Third Quarter, 1952. "U. S. Rubber take exception to sub paragraph 'B' under Paragraph 5-09 in that the Mutual capacitance of their wire is .115 MFD instead of .090 as specified."

Q. Was that the first time that you had any contact with Ahearn relative to latex-covered wire?

A. On latex, yes, sir.

Q. And at that time where did you see Mr. Ahearn?      A. At his place of business.

Q. And you say that was February——

A. 19.

The Court: Will you pause for a moment? What city was that?

The Witness: Bremerton.

The Court: You may inquire, Mr. Lane. Was that 1952?

The Witness: Yes, sir.

Q. (By Mr. Lane): Now, Mr. Upson, at that time, do you recall whether a price of latex cable was discussed at that time?

A. To the best of my knowledge, there was no price discussed.

Q. Had you at that time received a quotation



(Testimony of Merritt Upson.)

from the U. S. Rubber Company as to the [43] price?

A. Yes, sir.

Q. You had received at the time?

A. No, not at the time of the writing of this letter.

Mr. Lane: Will you mark this?

The Clerk: Plaintiff's Exhibit No. 7.

(Quotation U. S. Rubber marked Plaintiff's Exhibit No. 7 for identification.)

Q. (By Mr. Lane): Mr. Upson, I will ask you whether or not you recall calling the Westinghouse office from Mr. Ahearn's place of business on February 19 to ascertain if they had received a quotation on the price of latex from the United States Rubber Company?

A. To the best of my recollection I can't answer that.

Q. I show you what has been marked as Plaintiff's Exhibit 7 and ask you to state what that is, if you know.

A. That is a quotation from the United States Rubber Company on the latex wire in question.

Q. Dated what date? A. February 18.

Q. And does that show what date it was [44] received by Westinghouse?

A. It was received by Westinghouse on February 19. It looks like 8:00 a.m. [45]

\* \* \*

Mr. Lane: I will offer that letter in evidence, your Honor.



(Testimony of Merritt Upson.)

The Court: Admitted.

(Plaintiff's Exhibit No. 7 received in evidence.)

The Court: I note the word "quotation" on the form on which Exhibit 7 is written, and I wish you would tell the Court what kind of quotation it is, quotation of what, for what kind of material, if any.

The Witness: That was for the latex telephone wire.

Q. (By Mr. Lane): Quotation from whom, Mr. Upson? A. U. S. Rubber Company.

Q. And they are the only people that manufactured latex at that time, were they?

A. At that time, as far as I know. [46]

\* \* \*

The Court: You may inquire.

Mr. Lane: I will ask counsel if they have a copy of Mr. Ahearn's letter to the Navy under date of February 19, 1952?

The Court: In that connection, do you demand that it be produced?

Mr. Lane: Yes, your Honor.

The Court: You have not said so. Be specific, Mr. Lane.

Mr. Lane: It was covered in our subpoena.

Mr. Hoof: What is the date, please?

Mr. Lane: February 19, 1952.

Mr. Hoof: Here it is.

(Testimony of Merritt Upson.)

The Clerk: Plaintiff's Exhibit No. 8.

(Copy of letter marked Plaintiff's Exhibit No. 8 for identification.)

Mr. Lane: If your Honor please——

The Court: Will you pause for just a moment? You may make your statement, now, Mr. Lane. [47]

Mr. Lane: If your Honor please, Exhibit No. 8 is a copy of a letter from Mr. Ahearn that he wrote to the Navy under date of February 19, 1952, relative to the delivery dates and the use of latex cable and the Exhibit numbered 9 is the original letter from the Navy to Mr. Ahearn dated March 7, 1952.

(Letter to Mr. Ahearn marked Plaintiff's Exhibit No. 9 for identification.)

Mr. Lane: I would like to offer both Plaintiff's Exhibits 8 and 9 in evidence. I don't believe counsel has any objection to them. I am offering them now as a matter of sequence. I think it is helpful to the Court to keep the different dates in sequence.

The Court: Any objection?

Mr. Hoof: Oh, I have no objection, your Honor.

The Court: Each of them is now admitted. [48]

\* \* \*

The Court: Exhibit 8 is said to relate to delivery dates and use of latex. What, Mr. Upson, if you know, does Exhibit 9 relate to, the same subject or a different one?

(Testimony of Merritt Upson.)

Mr. Hoof: Exhibit 8, your Honor, does not refer to latex at all.

The Court: Exhibit 8 does not? Was any such statement about delivery dates and use of latex made by Mr. Lane concerning either of these two exhibits?

Mr. Lane: I have never seen Exhibit 8 before, your Honor, and I did not read it. I merely noticed that it was a letter from Mr. Ahearn to the Navy. The one Exhibit 9, which replies to that letter, does refer to latex. [49]

\* \* \*

Q. (By Mr. Lane): Mr. Upson, will you state to the Court, if you know, what Exhibit 10 is?

A. Exhibit 10 is a write-up on March 10, 1952, of the latex insulation wire. [53]

Q. And who wrote it up?           A. I did.

Q. And will you tell the Court the circumstances and when it was written up and why it was written up?

A. On March 10, I made a trip to Bremerton with Mr. Novich and we called on Mr. Ahearn. At that time I had the prices on the latex, and we discussed it with Mr. Ahearn and Mr. Rockwell came in at that time, and during the discussion, why, the time element came up where the paper covered would not be delivered for almost a year later than this could be delivered, and Mr. Rockwell said: "Well, we will have to finish the job. We should get the wire." Well, we discussed a

(Testimony of Merritt Upson.)

little further, and at that time, about that time, we left and went across the street.

The Court: Who is Mr. Rockwell? I have not heard his name before. Was he a Westinghouse employee or an Ahearn employee or was he an employee of either Westinghouse or Ahearn?

The Witness: Your Honor, he was Mr. Ahearn's foreman at that time. [54]

\* \* \*

A. (Continuing): Well, after that, we went back to Mr. Ahearn's store, and the subject of this wire came up again, and I asked Mr. Ahearn—I said: "What are we going to do on this?" And he said: "Well, we had better go ahead and get it." So late this afternoon or that day, March 10, 1952, I wrote this particular order, wrote it up, with the carbon copy which I personally mailed myself.

Q. Mailed it to him?

A. To Mr. Ahearn, Bremerton, Washington.

Q. When did you mail it?

A. Either the night of the 10th or the morning of the 11th.

Q. Now, I did not understand from your testimony who said: "We had better get the wire."

A. Mr. Rockwell made that statement first, and during the discussion he said: "I don't see how we can wait that long."

The Court: And say again, if you have already said so, for whom was he working or acting at that time?

(Testimony of Merritt Upson.)

The Witness: He was the foreman on this particular job for Mr. Ahearn at that time.

Q. (By Mr. Lane): Now, that was the meeting before you went out [56] and had coffee, as I understand it?

A. That is right, sir.

Q. And then what was said between you and Mr. Ahearn after you came back to Mr. Ahearn's place of business afterwards?

A. We discussed the price of this wire and I asked Mr. Ahearn what are we going to do. We have got to do something on this on account of the penalty clause.

Q. Well, who said that?

A. I did, and so Mr. Ahearn said: "Well, let's get the wire then."

Q. He said to you: "Let's get the wire" and you interpreted it as an order to order the wire?

A. That is right, sir.

Q. And was there discussion at that time as to the difference in the cost of latex cable and paper-wrapped wire?

A. That is right, sir.

Q. And approximately what was the difference in price?

A. Oh, roughly, around \$5,000.

Q. And who was present at that time?

A. Mr. Novich, Mr. Rockwell, Mr. Ahearn.

Q. Now, I am speaking about the last time, Mr. Upson. Who was present when you went back? [57]

A. Mr. Novich, Mr. Ahearn, and myself. [58]



(Testimony of Merritt Upson.)

The Court: All are present as before, and you may resume the interrogation of the witness.

Q. (By Mr. Lane): Mr. Upson, as I recall, we were talking about your meeting on March 10 in Bremerton at Mr. Ahearn's office, when we recessed at noon, is that correct? A. Yes, sir.

Q. At that meeting was there any discussion as to a change in the quantities of wire ordered?

A. Yes, there was.

Q. And what was the discussion or what was the change?

A. I think, as I recall, that due to some changes made on the job that would affect the lengths of the runs of this wire—I believe there were some telephone boxes [59] that were omitted from the job.

Q. Well, now, will you look at Exhibits 10 and 11 and tell me whether the quantities in that order are different than the quantities in the original order that was put in by Mr. Ahearn for telephone cable?

A. On my original write-up these quantities were given to me by Mr. Ahearn on March 10, 1952, and on our order on the factory which is taken from my write-up the quantities show the same as ordered. However, in manufacture sometimes they don't come out exactly even when they run this wire or manufacture it, so there may be an overage.

Q. Will you explain that to the Court? In speaking of 6 pair wire, how much of that was ordered? A. 6 pair wire? 1800 feet.



(Testimony of Merritt Upson.)

Q. And how much was delivered?

A. 1850 feet.

Q. And why is that difference?

A. As I explained, this wire is made up special, and sometimes as it is manufactured, you can't exactly come right out on 1800 feet. There will be a little overage on it, on the reel which they will ship.

Q. Is there generally an overage or an underage?  
A. Well, usually an overage.

Q. Is that the same amount that was ordered of [60] paper-wrapped wire, do you recall, or do you want to look back at the original order?

A. These quantities, I believe, differed from the quantities of the paper wrapped.

Q. In all of the three different types of wire there?  
A. Yes, sir.

Q. And where did you get the figures for the change in the quantities?

A. Those were given to me by Mr. Ahearn on March 10, 1952.

Q. Now, was there a discussion then as to delivery dates between latex and paper-wrapped wire on that date?  
A. Yes, sir.

Q. And what was the discussion? Could there have been any change in the delivery dates of the different types of wire?

A. No. The delivery dates remained the same. The paper and lead was still third quarter '53 and the latex was third quarter '52.

Q. And was there a discussion as to the penalty

(Testimony of Merritt Upson.)

clause in Mr. Ahearn's contract with the Government?      A. Yes, sir.

Q. Do you recall what the penalty clause [61] was?

A. To the best of my knowledge, I believe it was \$40 a day.

Q. And then as I understand, you made out Exhibit No. 10, the order, in pencil, did you?

A. Yes, sir.

Q. And how many copies were made of that order?      A. I made one copy.

Q. The original and one copy, you mean?

A. The original and one copy.

Q. And what was done with the original?

A. The original was turned into our office.

Q. And what was done with the copy?

A. The copy was mailed to Mr. Ahearn.

Q. And that is a copy of Exhibit 10?

A. Yes, that is right.

Q. And who mailed it?

A. I mailed it myself.

Q. Now, in connection with the Ahearn job, were copies of all orders that were written in long-hand mailed to him?

A. All of the orders that I wrote myself, I made a copy which I mailed.

Q. And why did you do that?

A. Well, merely to let him know just what had been written up and ordered. [62]

Q. And then, after that order is written out in

(Testimony of Merritt Upson.)

longhand, you say that the original goes to the office and then what happens to that copy?

A. That copy goes to the order editor. They check it and code it and then it goes to the purchasing department and they will issue a purchase order against this write-up, my write-up.

Q. Well, they will enter a purchase order to whom concerning what?

A. Well, in this particular case, the order would be entered on Electric Agencies who are representatives of United States Rubber Company.

Q. Covering what?                      A. Latex wire. [63]

\* \* \*

Q. Then, as I understand, the latex cable would be ordered by your purchasing department, did you say?

\* \* \*

Q. And do you know whether or not the latex cable was so ordered?

A. Yes, I knew it was ordered.

Q. Do you know approximately when the cable arrived at Bremerton?

A. The exact date I do not know but it was some time around the first of January, I believe, in 1953.

Q. And it was delivered to Mr. Ahearn at that time?                      A. Yes, sir.

Q. It was shipped direct to him, was it? [64]

A. Yes, sir.

The Court: Was the latex cable actually delivered on the job?

(Testimony of Merritt Upson.)

The Witness: Yes, sir.

The Court: Was anything done one way or another to accept or reject it. If so, what happened?

The Witness: If I remember correctly, I think the cable was there for about two weeks, I think, before anything was done.

The Court: You mean it was on the job for about two weeks?

The Witness: Yes, sir.

The Court: What happened, if anything did happen, then?

Q. (By Mr. Lane): Will you tell the Court what happened then, Mr. Upson?

A. I believe that the material was on the job and I believe that the Navy notified Mr. Ahearn that they would have to pull the wire and finish the job or there would be a penalty, and I believe that, at that time, they started pulling the wire.

The Court: How is that done?

The Witness: Actually I wasn't at the pulling of [65] the wire, but they usually jack these reels up so they will turn freely and take the wire off and pull it through these different conduits to a connection box, you can call it, or possibly they may make a splice.

Q. (By Mr. Lane): You saw the wire on the job, did you, Mr. Upson? A. No, sir.

Q. You were over at Bremerton between the time the wire arrived and the time it was pulled, weren't you? A. Yes, sir.

(Testimony of Merritt Upson.)

Q. And what was the occasion of your going over there?

A. I think that, as I recollect, Mr. Flechsig gave me a note that he had a phone call from, I believe it was from, Mr. Rockwell asking why the difference in the price of the wire, and Mr. Flechsig asked me if I would go over there and see what it was all about and report to him.

Q. And who did you talk with over there that day?

A. Mr. Rockwell.

Q. And Mr. Flechsig went over with you?

A. No, sir.

Q. You went over alone? [66]

A. Yes, sir.

Q. Had Mr. Rockwell up to that time known that latex wire had been ordered instead of the paper-covered wire?

A. To the best of my knowledge, he didn't.

The Court: Did not?

The Witness: Did not. I am sorry.

The Court: Whose employee was he?

The Witness: Mr. Ahearn's.

The Court: That is Mr. Rockwell?

The Witness: Mr. Rockwell, yes, sir.

Mr. Lane: He was the foreman on the job, your Honor.

The Court: I thought you said that he had had some talk before the latex was ordered about the need of it or whether it was needed, etc.

The Witness: That is right, sir.

The Court: He was not then told of the increased cost?



(Testimony of Merritt Upson.)

The Witness: He was not there when I was told to order the latex. [67]

\* \* \*

The Court: I do not understand you. You do not talk like a man that I would expect to have been on a sales end of this order and who had anything to say about the price. You claim to have had something to say about it and you do not seem to—You act as if there is something terribly mysterious about it or there is something troubling you. Is there anything you are not able to bring out here, that the questions do not call for?

The Witness: I was trying to recall our conversation. That was several years ago.

The Court: Well, that is about two years [70] ago?

The Witness: Yes.

The Court: How old are you?

The Witness: 52.

The Court: Have you ever been troubled with any memory troubles or anything of that kind?

The Witness: No, sir.

The Court: Proceed. Pretty soon the Court will suggest recalling the witness and have somebody else take the stand who knows anything about the case.

Q. (By Mr. Lane): Mr. Upson, as I understand, there was a discussion that day as to the price of this wire. That was the first day that Mr. Rockwell knew that the different cable had been



(Testimony of Merritt Upson.)

ordered, is that right? Is that what you testified to?

A. Yes, sir, to the best of my knowledge.

Q. And he was at that time discussing the price with you and you were probably discussing it with him. Will you tell the Court just what each said to the other.

A. Well, he said he had not authorized the ordering of the wire, and I told him that Mr. Ahearn had, and that we would do what we could. We would try to get to the bottom of the thing and see what could be done about it, if there was any error or anything. [71]

Q. Did he ask you to cut the price of the wire, change it?           A. No, he did not.

Q. Did you agree to do it?           A. No, sir.

Q. Had the Ahearn Electric Company at that time received approval from the Government to——

A. Yes, sir.

Q. (Continuing): ——to use this latex wire?

A. Yes, sir.

Q. You had knowledge of that?

A. Yes, sir.

\* \* \*

### Cross-Examination

By Mr. Hoof:

Q. Mr. Upson, I am going to attempt to summarize what I understand your testimony was in the last moment or so in connection with your trip to Bremerton in the early part of January, 1953. You stated that you went to see Mr. Rockwell, is

(Testimony of Merritt Upson.)

that correct?           A. Yes, sir.

Q. And you stated, at his office. Now, is [72] there any distinction between Mr. Rockwell's office and that of the Ahearn Electric Company?

A. Yes, sir. During that time Mr. Ahearn had sold his business on Sixth Street.

\* \* \*

Q. But if you contended that the agreement or anything in connection with the order had been done by Mr. Ahearn, why did you then go to see Mr. Rockwell at Mr. Rockwell's place of business instead of seeing Mr. Ahearn?

A. Well, Mr. Rockwell was foreman on the job, and he was the one that made the inquiry or the request.

Q. Did you not know that Mr. Rockwell's foremanship had been terminated some time prior to that?           A. No, sir.

Q. Mr. Rockwell had his own business in Bremerton at that time, didn't he, in January?

A. That is right.

Q. Rockwell Electric?

A. I believe that is what he called it, yes.

Q. Now, earlier in your testimony this morning with reference to the discussion that was had, that you testified to occurring on the 10th day of March, 1952 [73] at the office of the Ahearn Electric Company on Sixth Avenue in Bremerton, you testified, as I understand your testimony, that present at the meeting were yourself, Mr. Ahearn, Mr. Novich of your company in the lighting department, and

(Testimony of Merritt Upson.)

you said, I believe, a man whose name was Blackwell.       A. Blackman.

Q. Now, Mr. Novich, or rather Mr. Upson—pardon me, sir—you were present, were you not, on June 15, 1954, when the deposition of Mr. Rockwell was taken and the deposition of Mr. Blackman was taken?       A. Yes, sir. [74]

\* \* \*

Q. Why did you hesitate on your direct examination as to who was present at the meeting and you said: “I believe possibly a man—his name was Blackman”—that was about the way you answered the question.

A. Well, for this reason, a Mr. Blackman working there was in and out and actually he would not be a party to this discussion. It would be between Mr. Ahearn and Mr. Rockwell and I didn’t pay too much attention over there to just who was around other than just the four of us. [75]

\* \* \*

Q. Mr. Upson, now, as I understand your testimony this morning, at the meeting at which Mr. Rockwell was present, that is, the four persons I have now mentioned, Mr. Rockwell said—and I am quoting you now as to what Mr. Rockwell said, in your testimony this morning, at the March 10, 1952, meeting—“He said: ‘Let’s get the wire.’” Do you remember having so testified?       A. Yes, sir.

Q. And then, do you recall your testimony with reference to your meeting at Mr. Rockwell’s place

(Testimony of Merritt Upson.)

of business in the early part of January, 1953, which you have just testified to, in which a fair summary of your testimony would be that Mr. Rockwell had not authorized the wire and that he had not ordered the wire?      A. That is right.

Q. That is a fair summary of your testimony this afternoon?      A. Yes.

Q. Now, which is correct, sir?

A. Is the question addressed to me?

Q. Yes. Is your testimony this morning correct or is your testimony this afternoon correct?

A. Mr. Rockwell did not order the wire. During this conversation he said: "Well, we had better get it" or words to that effect—"We have got to finish the job"—He [77] had no authority to order it at that time, I understand.

Q. Well, did you not say, sir, this morning that in the meeting of the four of you, Mr. Ahearn, Mr. Rockwell, yourself and Mr. Novich, on March 10, 1952, that Mr. Rockwell said: "We would have to do something about it. We'd better get the wire."

A. That is just about the words he used, but I wouldn't take that as an order. [78]

\* \* \*

Q. Mr. Upson, you have been handed what has been admitted in evidence as Exhibit No. 3, which Mr. Upson, is the quotation from Westinghouse to the Ahearn Electric Company. I am correct in that?

A. You say which—

Q. I say, which exhibit is the quotation dated

(Testimony of Merritt Upson.)

January 31, 1952, from the Westinghouse Company to Ahearn Electric Company?

A. Yes. This is the quotation.

Q. Now, sir, did you or did you not deliver that quotation personally?      A. I did not. [83]

\* \* \*

Q. Did you discuss with him on or before February 1, of 1952, the matter of the supply of latex or paper-covered wire?      A. No, sir.

Q. Did you, on or before February 1, 1952, discuss with Mr. Ahearn anything with relation to expediting delivery of paper-covered wire that is shown in the quote, Exhibit 3?

A. No, sir.

\* \* \*

Q. If you will refer, Mr. Upson, to the, I believe, the [83] third sheet of Exhibit No. 3, referring to the references to the paper-covered wire, you will note there the language: "Orders on Telephone Cable should be placed direct with Graybar Electric Company, Seattle."      A. That is right, sir.

Q. And you will also note that it says: "Shipments—Telephone Cable—Third Quarter 1953."

A. Yes, sir.

Q. Now, on or about the 5th day of February, of 1952, you took an order from Mr. Ahearn for certain supplies for this work, and I am now asking it to be handed to you. That which has been marked as Exhibit No. 4,—correction—Exhibit No. 5.

A. I have Exhibit No. 5.



(Testimony of Merritt Upson.)

Q. Now, that is the order that you took on that day, is it not? I believe it is dated February 5.

A. February 5, that is right.

Q. That order was taken in Bremerton?

A. That is right, sir.

Q. And that order calls for paper covered wire?

A. That is right.

Q. That is for the performance of this contract, the Navy Yard contract? The order, Mr. Upson, is an order directly to the Westinghouse Company, is it not?

A. That is right. [85]

Q. As distinguished from being an order directly placed with Graybar?

A. That is right.

Q. That is correct?

A. That is right.

\* \* \*

Q. I asked you one question only—whether or not you did not request the order be placed for the wire to your company rather than having it separately placed to Graybar?

A. That is right, sir.

Q. You did ask that of Mr. Ahearn?

A. I did.

Q. Mr. Ahearn gave you the order, did he [86] not?

A. Yes, sir.

Q. Now, at the same time that you asked him to place the order directly with you, I will ask you, sir, whether or not you did not represent to Mr. Ahearn



(Testimony of Merritt Upson.)

on that date that if the wire were ordered directly from you, the paper-covered wire, as distinguished from ordering it from Graybar, that you would be able to obtain the paper-covered wire in ample time for Mr. Ahearn to complete the contract, that you had ways and means of getting the wire, that it was obtainable?

A. I had ways of getting the wire, but the completion date or the delivery date would remain the same.

Q. Well, now, as a matter of fact, you were aware, were you not, when you talked to Mr. Ahearn on the 5th of February, what the completion date of the contract was?

A. To the best of my knowledge, no, not at that time.

Q. You knew, however, did you not, that the completion date was in the fall of 1952?

A. That is right.

Q. You knew it was in the fall of '52?

A. That is right.

Q. And I again ask you whether or not you did not represent to Mr. Ahearn that if the order for the paper-covered wire were placed with your company, you would [87] obtain it, because you did have sources, you would obtain the paper-covered wire in ample time to complete the contract?

A. No, sir.

Q. No such suggestion was made by you?

A. No, sir.

Q. Now, was any such suggestion as that made

(Testimony of Merritt Upson.)

by you prior to the time that Mr. Ahearn put in his bid?       A. No, sir.

Q. I wish to refer, sir, to your pre-trial deposition taken on April 21, 1954.

Mr. Hoof: Do you have a copy, Mr. Clerk?

The Clerk: Yes.

(Hands it to the Court.)

The Court: What page is it?

Mr. Hoof: I am going to refer now, your Honor, to page No. 8.

Q. (By Mr. Hoof): On Line 5 of your deposition, I asked you a question, and the question refers to the quotation of January 31, which is Exhibit No. 3. This is the question:

“Q. I will ask you, Mr. Upson, whether or not on the 31st of January, 1952, you did not take this quotation to Bremerton and meet with Mr. [88] Ahearn?

“A. I can’t say whether it was taken over by myself or mailed.

“Q. Would you deny that you took it over?

“A. I wouldn’t deny anything.

“Q. What?

“A. I wouldn’t deny it. I say I can’t recall whether it was mailed. Normally, they go out in the mail; sometimes not.”

Was that your testimony, sir?

A. It was at that time, sir.

Q. I am now referring to page 17 of your dep-

(Testimony of Merritt Upson.)

osition, pre-trial deposition, and the particular testimony here resolves itself with reference to the meeting of March 10, of 1952, at the office of the Ahearn Electric Company.

The Court: What page?

Mr. Hoof: On Page 17, your Honor, Line 20, and I am going to have to take a question here in order to follow up with what I wish to arrive at, beginning on the next page.

Q. (By Mr. Hoof): I am now reading from your deposition.

“Q. Will you tell me just exactly, in your own words, what you obtained and what you did about it”? [89]

Now, this has reference to the quote of United States Rubber Company.

“A. I received this quotation on delivery from the United States Rubber Company on latex. At the time I made a trip to Bremerton, which I usually did anyway, two or three times a week. I discussed the prices with Mr. Ahearn and Mr. Rockwell at that time.

“Q. Would you tell me where the discussion took place? A. 826 Sixth.

“Q. Go ahead? [90]

\* \* \*

“A. These prices were discussed, at that time, and the delivery was third quarter of '53. Mr. Rockwell made the statement, he says, ‘My golly! We

(Testimony of Merritt Upson.)

can't wait until '53 for the other. We had better go ahead and get this wire.' And I wrote the order.

"Q. Was Mr. Ahearn present?

"A. Yes, sir.

"Q. Who is Mr. Novich?

"A. He is one of our lighting specialists."

Now, in your answer on page 18 of your pre-trial deposition, your statement is that you relied upon Mr. Rockwell's representation with Mr. Ahearn being present. You relied upon an order from Mr. Rockwell. A. No, sir

Q. Now, were the questions that I have now read to you and the answers that I have now read to you, the questions and answers given at your pre-trial examination, were they not?

A. Yes, they were given.

Q. Now, in your pre-trial examination, Mr. Upson, did you, sir, at that time ever say that two meetings had occurred?

A. I don't believe I did, sir. [91]

\* \* \*

Q. Was Mrs. Ahearn present at the March 10 meeting or at any of the asserted March 10 meetings?

A. To the best of my recollection, she wasn't there on March 10.

\* \* \*

Q. She was not present? I am going to ask [92] one question in a little different way than I have

(Testimony of Merritt Upson.)

previously asked it. Now, to start with, your company, according to the testimony of Mr. Schindler, was furnished with specifications for the work that was to be accomplished at the Navy Yard as well as certain blueprints for the purpose of taking materials off? A. From what source?

Q. Well, Navy Yard specifications and blueprints for this particular work. As I understood his testimony, he took the materials off those.

A. That is right. He does, sir.

Q. Now, did you see those specifications yourself prior to February 5, of 1952?

A. No, sir.

Q. Why were you willing, Mr. Upson, to accept from the Ahearn Electric Company an order, which is in evidence as Exhibit No. 5, written up by yourself, for paper-covered wire, Telephone Cable, in deviation from the quotation as to where it should be ordered if you could not supply that wire by the fall of '52 when the contract had to be completed?

A. Well, the answer to that would be this way: that Graybar themselves do not deliver the wire any sooner than we could. We have to purchase from them, and in order to keep this order all in one, like a package, what [93] we call a package deal, I would accept it that way as a courtesy.

Q. Now, in this Exhibit No. 5, which is your order where you accepted the order for the paper-covered wire, you placed no limitation, did you, as to the time for delivery?



(Testimony of Merritt Upson.)

A. In my actual order, my writing?

Q. Yes, sir.

A. I was going by the quote, the quotation.

Q. You placed no limitation for time of delivery. In other words, you did not say that we can't deliver this. The order is placed with us. Now we can't deliver this until '53. You didn't say that in the order, did you?

A. I don't believe it is on my order. It is on our quotation.

Q. But your quotation, sir, was not followed.

A. Pardon?

Q. Your quotation, sir, was not followed in that you accepted the order rather than having Mr. Ahearn order directly from Graybar. You testified—you deviated from the quotation, sir, did you not?

A. Yes, that is right.

Mr. Hoof: No further questions. [94]

\* \* \*

### Voir Dire Examination

By Mr. Hoof: [104]

\* \* \*

Q. And did I understand it, your testimony is that, with reference to Exhibit 10, you personally mailed a copy of that to Ahearn Electric?

A. Yes, sir.

Q. That is a copy of No. 10?

A. That is right, sir.



(Testimony of Merritt Upson.)

Mr. Hoof: I will have no objection to Exhibit No. 10.

The Court: That is admitted. [106]

(Plaintiff's Exhibit No. 10 is received in evidence.)

Mr. Hoof: No. 11, I will still object to that, your Honor, as being an order to the Electrical Agencies and no showing, except automatically, that a copy would go to Ahearn Electric.

The Court: The Court thinks that since that is more in the nature of an office record that somebody else has been keeping and using, such witness should be produced to account for its history and its present condition in respect to notations noted thereon and other items of divergence of identity from the identity of Plaintiff's Exhibit 10. The Court is unable to take the view that it is admissible at this time and does sustain the objection as of this time with leave to adduce additional proof. [107]

\* \* \*

**A. J. FLECHSIG**

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

**Direct Examination**

By Mr. Lane: [108]

\* \* \*

Q. Mr. Flechsig, state, if you know, when the latex cable was ordered by Westinghouse from whoever they ordered it from.

A. The order for it was typed on March 11, 1952, and it was either mailed to Electric Agencies, who are the agent for United States Rubber in this area, on that evening or the next morning. U. S. Rubber acknowledged receipt of it or acknowledged in their letter of November 21, 1952, that the factory accepted the order on March 24, 1952.

The Clerk: Plaintiff's Exhibit No. 15.

(Invoice from U. S. Rubber marked Plaintiff's Exhibit No. 15 for identification.)

Q. (By Mr. Lane): Mr. Flechsig, there has been handed you Plaintiff's Exhibit 15, will you state to the Court what it is, please?

A. That is invoice from United States Rubber Company to Westinghouse Supply. [124]

Q. And what is the date of it, please?

A. It is dated December 24, 1952.

Q. And does it show on it the date that the latex was shipped?

A. It shows shipment as of 12-20-52.

(Testimony of A. J. Flechsig.)

Q. To whom?

A. To Ahearn Electric Company, Quarters Area, Puget Sound Naval Shipyard, Bremerton, Washington.

Q. Do you know the date that the cable arrived at Bremerton?

A. Mr. Lane, I do not know that exactly.

Q. The approximate date?

A. I do know that from a phone call that I made that Black Ball Freight Lines signed for it on January 5, 1953. Signed for by a Mr. A. G. Morris.

Q. Would it be delivered a short time thereafter?

A. It should be delivered the next day. Whether that is true, I don't know. I have asked for a certified copy of the delivery bill of lading which I haven't got yet.

The Clerk: Plaintiff's Exhibit No. 16.

(Invoice for latex marked Plaintiff's Exhibit No. 16 for identification.) [125]

Mr. Lane: I will ask that Plaintiff's Exhibit No. 15 be admitted in evidence, your Honor.

The Court: Any objection?

Mr. Hoof: No, your Honor.

The Court: Admitted.

(Plaintiff's Exhibit No. 15 is received in evidence.)

Mr. Lane: Do you have a copy of the invoice

(Testimony of A. J. Flechsig.)

covering this cable, Mr. Hoof, that was requested of you?

Mr. Hoof: Here it is, Mr. Lane.

Mr. Lane: I will substitute this then, your Honor, for that.

The Court: For No. 16?

Mr. Lane: For 16, yes.

The Court: The Clerk will kindly withdraw what was previously marked 16 and delete the Clerk's marks therefrom and return it to counsel who produced it and will place those same marks on what is now the substituted copy, and the substitution of what now is offered is approved and ordered by the Court. [126]

(At this time the exhibit previously marked Plaintiff's Exhibit No. 16 for identification is withdrawn and a substituted copy of the invoice for latex is marked Plaintiff's Exhibit No. 16 for identification.)

Q. (By Mr. Lane): Mr. Flechsig, there is handed you Plaintiff's Exhibit 16. Will you state what that is, please, if you know?

A. That is our invoice covering a shipment of latex to Ahearn Electric.

Q. And what is the date of that, please?

A. 12/30/52.

Q. And would that be the date approximately when it was mailed?

A. It was either mailed that day or the day after.

Q. Now, will you check the prices on that and

(Testimony of A. J. Flechsig.)

see if they correspond with the prices on Exhibit No. 10, please?

A. The prices per thousand—just a minute—the prices per thousand check. The footage does not exactly check, nor does Exhibit No. 10 show the copper adders. [127]

Q. Now, the prices on the three cables check, though? A. That is right.

Q. And why is the footage a little different?

A. Well, in the case of the 6 pair, Exhibit 10 shows 1800 feet. Exhibit 16 shows 1850 feet. Manufacturing tolerances normally by most wire manufacturers permit a 5% plus or minus tolerance quantity.

Q. And what about the other—

A. In the case of the 26 pair, which is Item 2, the quantity as shipped and billed was 1945 feet, and on Exhibit 10 it shows it as ordered for 1900 feet. The third item for the 51 pair, the invoice on Exhibit 16 shows as shipped and billed 1278 feet as against 1250 feet ordered.

The Court: Does the paper have a name?

The Witness: Which one is that, your Honor?

The Court: Plaintiff's Exhibit No. 16.

The Witness: No. 16 is Westinghouse Electric Supply Company invoice.

The Court: Does No. 15 have a name? If so, will you state what it is?

The Witness: No. 15 is United States Rubber Company's invoice to Westinghouse Electric Supply. [128]



(Testimony of A. J. Flechsig.)

Q. (By Mr. Lane): And 16 is the invoice from Westinghouse to Ahearn, is that right?

A. That is right, sir. Both of them are identified by Contract NOY 28688.

Mr. Lane: I will offer that in evidence.

Mr. Hoof: No objection.

The Court: Plaintiff's Exhibit No. 16 is now received in evidence.

(Plaintiff's Exhibit No. 16 received in evidence.)

Q. (By Mr. Lane): Now, if you will look at Plaintiff's Exhibit No. 16 and if you will look at Plaintiff's Exhibit 13 and Plaintiff's Exhibit 11. will you please explain to the Court, if you know, why the name of the purchaser or the customer was changed and why the address was changed?

A. I have a part of those records with me. The question you are asking is why on Exhibit 11 and Exhibit 13 the "Electric Company" was x'd out and the word "John" was placed ahead of Ahearn?

Q. Yes. A. This will take a minute.

(Looking through documents.) [129]

On October 7, 1952, our Tacoma office wrote our credit department advising that their salesman calling on Bremerton area at that date was advised of a change of ownership for the Ahearn Electric Company, Bremerton. The new owners are a Mr. Ambrose Costello and a Mr. Earl Ferry. We were advised that they will operate under the name of



(Testimony of A. J. Flechsig.)

Ahearn Electric. This was verified by a Dun and Bradstreet report dated October 8, 1952 which reads—— [130]

\* \* \*

Mr. Lane: If your Honor please, I have here the original ledger sheet of this account which counsel has consented not be put in evidence but I have an exact copy of it.

The Court: You may have that copy marked.

The Clerk: It will be Plaintiff's Exhibit No. 17.

(Copy of ledger sheet marked Plaintiff's Exhibit No. 17 for identification.)

Q. (By Mr. Lane): Mr. Flechsig, I hand you what has been marked [131] Plaintiff's Exhibit No. 17 and ask you to state what that is, please.

A. This, Mr. Lane, is an exact copy of our ledger sheet on the job identified as Job Account, Puget Sound Naval Shipyard, NOY 28,688.

Q. And are you familiar with that, Mr. Flechsig?      A. I am, sir.

Mr. Lane: I will, your Honor, ask that this be admitted in evidence.

The Court: It is admitted.

(Plaintiff's Exhibit No. 17 received in evidence.)

Q. (By Mr. Lane): I will ask you to state whether or not, if you know, whether that ledger account shows all of the charges for goods that were

(Testimony of A. J. Flechsig.)

delivered to Mr. Ahearn and all credits, whether by cash or otherwise.

A. To the best of my knowledge, that is right.

The Court: May I ask as of what date it does that?

The Witness: The final credit on it, which was a payment, was on December 14, 1953.

The Court: You may inquire. [132]

Q. (By Mr. Lane): Now, would that show all of the charges and credits from the time the job account opened in February '52 down to the present time?

A. That is right. The first charge was on February 26, 1952.

Q. And what is the balance now due on this account to Westinghouse from Mr. Ahearn?

A. \$5,469.51.

Q. Mr. Flechsig, as I understand the testimony, the latex cable was not manufactured by Westinghouse but was purchased by Westinghouse from the United States Rubber, or one of its subsidiaries?

A. That is correct. The order was entered on Electric Agencies who are the representatives of U. S. Rubber in this area. We were invoiced directly by U. S. Rubber.

Mr. Lane: Now, if you would hand Mr. Flechsig Exhibits 15 and 16, please?

(Plaintiff's Exhibits 15 and 16 are handed to the witness.)

The Court: Do you have the date, Mr. Flechsig,

(Testimony of A. J. Flechsig.)

and, if so, will you now state it, when the order was put in by your company to United States Rubber for the latex you just mentioned? [133]

The Witness: Your Honor, I will have to do that from memory. There is an exhibit——

The Court: Would you like to refer to it or ask counsel's assistance in so doing?

The Witness: That is our direct order copy. This is a copy of it. The original I would like to see. Oh, here it is. Excuse me. Our order on Electric Agencies was dated March 11, 1952.

The Court: I ask you if you have just now referred, before making your last answer, to Plaintiff's Exhibit No. 10?

The Witness: Well, I was, your Honor, referring to No. 11.

The Court: Will you look at Plaintiff's Exhibit No. 10?

The Witness: I have Exhibit No. 10 here, your Honor. Exhibit No. 10 was dated March 10.

The Court: What kind of an instrument is it?

The Witness: Do you mean, your Honor——

The Court: No. 10.

The Witness: That is our salesman's write-up, longhand write-up, of the order that he turns into the office from which the purchase order is written.

The Court: That completes the Court's inquiry. You may resume the interrogation. [134]

Q. (By Mr. Lane): Then if you would just continue on, Mr. Flechsig, maybe we can clear this up.

(Testimony of A. J. Flechsig.)

I refer now to Exhibit No. 11, and will you tell the Court what that is and how it is made, please?

The Court: It is rejected and, of course, do not state the contents. The question is a proper one but confine your answer to it directly. Read the question.

(The last question is read by the reporter.)

The Witness: That, your Honor, is the original of our direct shipment order. By that I mean, as I testified yesterday, it is the original piece of paper on which the typist types the order. If I may refer to Exhibit 12——

The Court: You may do that. That is the direct shipment form?

The Witness: That is right.

The Court: It is No. 3050 in six sheets. It is an unfilled out form as to all six sheets.

The Witness: That is right. Now, the second copy or the first carbon copy or the second piece of paper in the form constitutes the purchase order on our supplier of whatever it may be, whatever the material may be. [135]

The Court: Very well. You may proceed.

Q. (By Mr. Lane): And Exhibit No. 11 is made up from what, Mr. Flechsig?

A. Exhibit No. 11 is made up from our salesman's order write-up which is identified here as Plaintiff's Exhibit No. 10.

Q. And then what happens, if you know, to the six copies of which Exhibit 11 is a part?

(Testimony of A. J. Flechsig.)

The Court: You mean in the ordinary course of his business?

Q. (Continued): In the ordinary course of your business procedure at your office, Mr. Flechsig.

A. All right. I would like to——

The Court: Can you not answer that question directly?

A. (Continued): ——again refer to Plaintiff's Exhibit 12, if I may. Then I can follow the procedure and explain how it goes.

(Witness is handed Plaintiff's Exhibit 12.)

The first sheet is the original typed copy and it is our order service copy. It remains in the files available to all of us office personnel.

Mr. Hoof: May it please the Court, I believe that Mr. Flechsig fully went through the exhibit [136] yesterday.

The Court: I feel the same way about it and I doubt if Mr. Lane's question to him contemplated doing of the same work or covering the same ground. I think he wanted the witness to speak about this specific thing, did you not?

Mr. Lane: That is it. I thought possibly the Court did not understand the procedure.

The Court: I am not concerned about the procedure, I am concerned about what happened in this case and what connection, if any, did this defendant have with this exhibit. That is the thing that is involved.

Mr. Lane: All he can do is testify, your Honor,



(Testimony of A. J. Flechsig.)

what happens in the normal course of their office procedure.

The Court: Well, that, of course, is interesting if it is connected up with what actually occurred in a given case, but the mere fact that an office has a practice does not alone prove admissibility. There ought to be some connection between the exhibit and the defendant. Proceed.

A. I think, Mr. Lane, then, I will answer your question this way: That in our standard procedure there is a direct shipment acknowledgment copy, which as is [137] evidenced by Exhibit No. 11, has typed thereon the description of the material ordered, the amount ordered, and the price thereof, and all of that data shows on the acknowledgment copy.

Q. All right. Now, Mr. Flechsig, I will ask you to refer to Exhibit No. 16.

A. I have it here.

Q. And I ask you to state whether or not, if you know, the information on Exhibit No. 16, which is the invoice from your company to Mr. Ahearn, the quantities and the amounts and the price of the latex cable is the same or if it is different than that in Exhibit 11, what has been marked as Exhibit 11?

A. The unit price is the same on all three items.

The Court: And you have already explained, have you not, that there was a difference in the amount due to the tolerance in the trade of permitting the supplier to furnish a small quantity more or less than that ordered in order to accommo-



(Testimony of A. J. Flechsig.)

date the quantity proximal production of the article, is that right?

The Witness: That is right, your Honor.

Q. (By Mr. Lane): This type of cable is all run especially, is [138] it, Mr. Flechsig?

A. Under normal conditions, yes. Occasionally they have a small amount in stock. At the time the order was entered, I seriously question whether there was any stocks.

Q. Now, at the time this cable was ordered, what was the condition of the market on telephone cable?

Mr. Hoof: May it please the Court, I wish to object to the question in that the question as to the market on telephone cable seems to me not to be material to the case in any way.

The Court: You mean it is a question of contract?

Mr. Hoof: Yes, your Honor.

The Court: What is the purpose of your question, Mr. Lane?

Mr. Lane: The purpose of my question, your Honor, was to show that at the time this cable was ordered, copper wire was under priority, and there was a scarcity of it, and that it was not always possible to purchase what a certain person wanted. I would like to show at this time that that condition existed, and that possibly that may be the reason why the cable which was originally ordered could not be supplied until a year and a half later, [139]

Mr. Hoof: Mr. Lane, is there any doubt in your mind that the Navy issued a priority for this?

(Testimony of A. J. Flechsig.)

Mr. Lane: I don't know. The cable was not available.

The Court: I think the Court will overrule the objection. That is the ruling. Read the question.

(The last question was read by the reporter.)

A. To the best of my knowledge, and I think I can say that with very definite certainty, there was a critical shortage of not only telephone copper wire but other copper wires as well, and an order could not be entered without a priority, and if my recollection serves me right, going back to what I said a minute ago, manufacturers were not permitted to maintain any amount of stocks. There was some limit placed there on which I cannot answer. [140]

\* \* \*

### Cross-Examination

By Mr. Hoof:

Q. I would like to discuss with you momentarily the matter of priorities again, and the original order, as you will recall, called for the paper wire, that is Exhibit No.—Well, there are two Exhibits that show it—They are Plaintiff's Exhibits Nos. 4 and 5, Plaintiff's Exhibit No. 4 being the original purchase order written up at the Ahearn Electric Company and Plaintiff's Exhibit No. 5 being the take-off, as I understand it, by Mr. Upson. I am correct on the exhibit numbers, am I not?

A. You are, Mr. Hoof.

(Testimony of A. J. Flechsig.)

Q. Now, the priority for the third quarter delivery of 1952 was issued based upon the original order, was it not?

A. That was correct, which we couldn't accept on that basis.

Q. Well, I am not asking for your acceptance, whether you did or did not, sir. The priority was issued on the original order.

A. Material, that is right, on the original [144] order.

The Court: Pardon me. That Plaintiff's Exhibit 4 is the one which related to the original order, namely, to the paper-covered cable, is that right?

The Witness: Yes, because it refers to it as Westinghouse Type ENB.

The Court: You may inquire.

Q. (By Mr. Hoof): Now, actually, as you have testified, the amount of copper in a particular gauge of wire is actually the same?

A. That is correct, sir.

Q. Now, there was no change in the priority, was there, extended to you?

A. In the priority extended?

Q. Yes.

A. No, not to my knowledge, there wasn't.

Q. And, as a matter of fact, the latex cable they finally substituted in this matter was of a heavier gauge?

A. That is not true.

Q. It is not?

A. No. They are both 19 gauge. [145]

(Testimony of A. J. Flechsig.)

Q. Now, the debit entry on the accounting sheet, No. 17, corresponds with the exhibit we have just discussed, does it not?

A. With Exhibit 15? [149]

Q. Yes.

A. Except for one detail, Mr. Hoof, and that is Exhibit 15 shows our margin of profit which was 5%, and as such will be 5% less on the price of the cable only than the figures shown on Exhibit 17.

The Court: May I interrupt you, Mr. Hoof?

Mr. Hoof: Yes, your Honor.

The Court: Mr. Flechsig, do you recall whether you ever personally talked with Mr. Ahearn or any one acting for him regarding payment of this account after the latex cable was furnished and with reference to the effect of such latex cable costs on the bill? Did you ever talk to him about paying the bill after that happened?

The Witness: Your Honor, I did after they received our bill.

The Court: What bill? This invoice?

The Witness: No.

Mr. Lane: Plaintiff's Exhibit No. 16.

The Court: Did you talk to Mr. Ahearn personally?

The Witness: I talked to Mr. Ahearn on or about February 14. I was over to his house.

The Court: Will you state what, if anything, was said by you and by him regarding his obligation [150] to pay the account as affected by your furnishing latex instead of paper-covered cable?

(Testimony of A. J. Flechsig.)

The Witness: We had, your Honor, quite a bit of discussion there on that. Naturally, he was——

The Court: Just, if you can, say in substance and effect what the conversation was.

The Witness: He was objecting to the bill.

The Court: Because of the latex item?

The Witness: Because of the increase in price, contending that he never ordered latex.

The Court: Did he ever thereafter make any payment on the account? If so, when and how much?

The Witness: As I recall, our meeting was on February 14. It was on a Saturday.

The Court: You should state the year.

The Witness: It was 1953, and on his total account on May 5 he paid \$5,000 and on July 7 he paid the difference between the balance of \$9,978.33 and \$5,489.72.

The Court: Did he make to you any statement at any time about confining those payments to the order as affected by the paper-covered items or did he make the payments without so notifying you?

The Witness: On July 7, when he paid [151] that difference, he made a deduction by claim in the amount of \$5,489.72, which he did not pay at that time.

The Court: Did he say or do anything which you understood was a waiver by him of his objection to the increased amount of the bill due to your furnishing the latex instead of the paper cable?



(Testimony of A. J. Flechsig.)

The Witness: Verbally he objected.

The Court: All the time?

The Witness: After he received the bill.

The Court: You may inquire.

Q. (By Mr. Hoof): I want to go back of that, Mr. Flechsig, just a moment. The first knowledge that you personally had of this matter was, I believe, in the first week of January of 1953 when a Mr. Rockwell, an employee of the Ahearn Electric Company, called you and stated that the Ahearn Electric Company had just received the invoice for the latex wire and made an objection to it, and then subsequent to that time, having heard that, you then, at a later date, some time presumably as you suggested in February or thereabouts, you went over to look into the situation yourself?

A. Yes, because in the meantime I had sent, I believe, if my recollection serves me right, the following [152] day after Mr. Rockwell called, I sent Merrit Upson over to Bremerton to square this away because at that time I assumed there must be some misunderstanding, that certainly we wouldn't have ordered latex cable without somebody's authority.

Q. Now, would I, in the following statement which I am about to make, make a fair resume of your action personally—Now, I am not speaking of anything other than personally—as to the Ahearn account. While you had somewhat of a general knowledge——

Mr. Lane: Counsel, I would object to this. I think you should let Mr. Flechsig tell what he knows



(Testimony of A. J. Flechsig.)

rather than you put the words in his mouth, so to speak.

Mr. Hoof: This is cross-examination.

The Court: Read the question.

(The last question is read by the reporter.)

The Court: The objection is sustained.

Mr. Lane: If your Honor please, I will waive any objection because I think it will speed it along.

The Court: Very well, then. In view of that attitude, you may finish the question. If you would like it repeated again to pick it up, it will be [153] done.

Mr. Hoof: No, I think I can proceed, your Honor.

Q. (By Mr. Hoof): Now, would this be a fair summary of your personal knowledge of this matter: That, other than in a general way, this account had not particularly been called to your attention, where there were any disputes or anything of that kind, up until the first week of January, 1953; that your immediate information was received by an objection by Mr. Rockwell to the billing and to the receipt of the latex wire; that thereafter, so far as your personal knowledge is concerned, some time in the month of February, 1953, you called at the Ahearn residence; at that time Mr. Ahearn continued to object and thereafter it would be understood that in the payments on the account he paid down to the difference between the cost of the latex

(Testimony of A. J. Flechsig.)

and the paper wire, all other matters as far as this job account having been paid?

A. Mr. Hoof, generally, your statement is correct. I am going to add a few things in there, and that is that, if my memory serves me right, if I recall exactly, Mr. Ahearn came to our office, oh, I would say on about two occasions and at the time, each time he was there, I was still unable to verify that for the reason that my man, Mr. Upson, had not been able—or had not [154] given me—all of the information I needed. Therefore, after I had accumulated all of that information, I went over to Mr. Ahearn at his home where he had moved his business to, also with Mr. Upson, on a Saturday morning, and we discussed it, and at that time I made no concessions.

Q. Nor did Mr. Ahearn?

A. Nor did Mr. Ahearn. That is correct.

Q. Now, one further question please. If Mr. Ahearn did call at your office, it was, of course, after the billing for the latex. That would have been after the early January call from Mr. Rockwell to you?

A. You are talking now only about——

Q. About the latex.

A. About the bill on the latex?

Q. That is correct. [155]

(Testimony of A. J. Flechsig.)

Redirect Examination

By Mr. Lane:

Q. Mr. Flechsig, was paper-wrapped cable, such as ordered in this case originally, available at this time prior to the third quarter of 1953?

A. No, sir.

Q. And that cable is manufactured by whom? Who is it manufactured by? Who was it manufactured by at that time?

A. Paper and lead, you mean, Mr. Lane?

Q. Yes.

A. Western Electric Company.

Q. Does that company have any connection with Westinghouse?

A. No, sir. There was also—General Cable also made paper and lead, but it was not available to us then. It was a different type of paper wiring but it was still paper and lead.

The Court: What month in '53 was that? [156]

The Witness: Third quarter of '53, your Honor.

Mr. Lane: That is all.

Mr. Hoof: I have one question now and only one.

Recross-Examination

By Mr. Hoof:

Q. Would you explain, Mr. Flechsig, if you can, please, why a paper-sheathed wire, that paper being readily available, and with a lead covering, that is paper-wrapped lead covering, would require a longer

(Testimony of A. J. Flechsig.)

time for delivery than a wire requiring a special latex or rubber covering, the rubber being in shortage and lead-sheathed?

A. I can answer that. The telephone company, which Western Electric, as I understand it, is a subsidiary of the Bell Telephone Company or vice versa—I don't know which way it goes legally—but telephone cable and communications was very critical during the war, and, to the best of my knowledge, the bulk of the telephone wire going into various installations throughout the nation were paper and lead, and latex was used only in special cases, being particularly adapted to salt conditions.

The Court: S-a-l-t? [157]

The Witness: Salt, salt atmospheric conditions, and the paper and lead being about—well, I will reverse the thing—latex being about three times, as I recall, as a general average, latex is about three times as expensive as paper and lead, about three times as expensive, so everybody was shooting their orders to paper and lead suppliers, which are limited.

The Court: Tending to exhaust the supply?

The Witness: The manufacturing facilities.

The Court: They overcrowded the manufacturing facilities, leaving a better opportunity to acquire latex than paper-covered?

The Witness: That is right. [158]

Mr. Lane: If your Honor please, I have [181] obtained a rephotostat of the Exhibit 1 that I offered the other day, which is black on white, which I would now like to offer in evidence as being a certified copy from the General Accounting Office of the contract and of the bond.

The Court: This photostat copy of the material in question referred to in counsel's statement, which now in form meets the requirements of the local rules regarding photostats, will now be marked Plaintiff's Exhibit 18 for identification, and it would be proper for you to submit for inspection by opposing counsel along with this exhibit, the thing of which it is another photostat. It is the other certified copy which does not comply with the Court's ruling and the Court does not accept it.

(Photostat copy contract and bond marked Plaintiff's Exhibit No. 18 for identification.)

(Mr. Hoof examines Plaintiff's Exhibit No. 18 for identification.)

The Court: What would you call that thing, Mr. Lane?

Mr. Lane: It is a certified copy of the contract and the bond. [182]

The Court: It is a photostat of a certified copy—

Mr. Lane: Of the contract and the bond.

Before I offer that in evidence, I will ask if Mr. Ahearn has since yesterday found his copy of the contract?



Mr. Hoof: No, but I will stipulate that that is a copy of the contract.

The Court: Do you have any objection to its being admitted?

Mr. Hoof: I agree to its admission.

The Court: Plaintiff's Exhibit No. 18, containing a copy of both the contract and the bond, is admitted.

(Plaintiff's Exhibit No. 18 received in evidence.) [183]

\* \* \*

Mr. Lane: Now, I will ask counsel if he or Mr. Ahearn have the copy of Mr. Ahearn's letter to the Navy dated January 18, 1953, and the reply from the Navy dated January 26, 1953?

Mr. Hoof: Mr. Lane, here they are. They were on your side of the table.

Mr. Lane: Well, they are part of the exhibits and they came from Mr. Ahearn's file, is that correct?

Mr. Hoof: Yes.

Mr. Lane: Mr. Ahearn now produces them, and I would like to have them marked. The one from Mr. Ahearn to the Navy should be marked first, I believe.

The Court: Let it be marked Plaintiff's Exhibit No. 20.

The Clerk: Do you want them to go together, your Honor?

The Court: Will you determine whether it is all right to have them both one exhibit?



Mr. Lane: Is it all right to have them as one exhibit?

Mr. Hoof: Yes.

The Court: Let them both be attached and let them be marked as one exhibit. [185]

The Clerk: Plaintiff's Exhibit No. 20, your Honor.

(Copy of letter by Mr. Ahearn to Navy and reply marked Plaintiff's Exhibit No. 20 for identification.)

The Court: I wish counsel would now state agreeably if he can, agreeable to opposing counsel, the name which reflects the information contained in this Exhibit 20.

Mr. Lane: These letters——

The Court: Copies of letters or letters?

Mr. Lane: One of them is a copy and the other is an original.

The Court: One is a copy of letter of January 8, 1953, from Ahearn Electric to the Navy Officer-in-Charge and the other is from that officer in response to it?

Mr. Lane: Yes, your Honor.

The Court: Do you offer this now?

Mr. Lane: Yes, your Honor.

The Court: Any objection?

Mr. Hoof: No objection.

The Court: Plaintiff's Exhibit No. 20 is received in evidence. [186]

\* \* \*

## EDWARD NOVICH

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Lane:

Q. What is your name?

A. Edward Novich.

The Court: How do you spell your last [187] name?

The Witness: N-o-v-i-c-h.

Q. (By Mr. Lane): Where do you reside, Mr. Novich?

A. 2423 - 105 N.E., Bellevue, Washington.

Q. Where are you employed?

A. Westinghouse Electric Supply Company.

Q. How long have you been employed by that company?

A. Seven and one-half years.

Q. Were you employed by them during the year 1952?      A. I was, sir.

Q. Are you acquainted with Mr. Ahearn?

A. Yes, sir. I am.

Q. And——

The Court: For my convenience, will you restate in what capacity you served the company, if you did, in 1952?

The Witness: At that time I was a lighting specialist.

The Court: With what company?

(Testimony of Edward Novich.)

The Witness: Westinghouse.

The Court: You may inquire.

Q. (By Mr. Lane): What were your [188] duties?

A. To assist the salesmen in lighting sales and to do engineering required in lighting sales.

Q. I believe you stated you are acquainted with Mr. Ahearn? A. Yes, sir. I was.

Q. Will you tell the Court the occasion of your acquaintance with him? I believe you only met him once, did you?

A. No. I met him a number of times, always on lighting problems, or while I was with Merritt in Bremerton on other lighting problems.

Q. Let me ask you this question then, Mr. Novich. State whether or not you had occasion in February, 1952, February or March, 1952, to go to Bremerton with Mr. Merritt Upson of the Westinghouse Company? A. Yes, sir.

Q. To call upon Mr. Ahearn?

A. At Merritt Upson's request, I accompanied him on a trip to Bremerton on March 10, 1952.

Q. And for what purpose did you go?

A. To make a lighting survey on a market in the Bremerton area at Mr. Ahearn's request.

Q. And did you and Mr. Upson call on Mr. Ahearn?

A. Yes, sir. We did immediately upon our arrival in Bremerton. [189]

Q. Will you tell the Court what happened on that occasion?

(Testimony of Edward Novich.)

A. Mr. Ahearn was present in the shop when we arrived——

Q. Now, you are speaking of his electrical shop?

A. His electrical shop on Sixth Avenue in Bremer-  
erton.

The Court: What date was that again, please?

The Witness: March 10, 1952, sir.

The Court: You may inquire.

A. (Continued): Merritt promptly brought up the question of the quotation he had with him on latex cable and mentioned the price and the delivery, and at about that point Mr. Rockwell, Mr. Ahearn's superintendent, came into the shop, and the three of them discussed the latex cable and the substitution of it in place of paper-wrapped. Mr. Rockwell at that time made a statement that they probably ought to get that cable ordered because they couldn't wait until the arrival of the paper-wrapped. However, he wasn't about to order it. After a little further discussion on the cable, why, Merritt Upson, Mr. Rockwell, and myself went out for a cup of coffee. Mr. Rockwell then left Merritt and I, Mr. Upson and I, and we proceeded to make the lighting survey that I had come over for. At that place we received an order, and we returned to Mr. [190] Ahearn's shop on Sixth Avenue and told him we had received the order, and at that time Mr. Upson——

Q. The order for the lighting fixtures?

A. For the lighting fixtures, yes, sir. At that time Mr. Upson—I believe when we returned there

(Testimony of Edward Novich.)

was one other person present in the shop and it is just a vague recollection that a workman of Mr. Ahearn's was there.

The Court: Did, in your presence, Mr. Ahearn on that day, and also in the presence of Mr. Upson, say in substance and effect to Mr. Upson: "Go ahead and order the latex cable."?

The Witness: Yes, sir, he did.

The Court: Was Mr. Rockwell present then?

The Witness: No, sir. Mr. Rockwell had left us and proceeded to some other business.

The Court: You may inquire.

A. (Continued): After Mr. Ahearn placed the order with Mr. Upson, Mr. Upson asked Mr. Ahearn for the changed lengths which we had discussed earlier, which they had discussed earlier, and Mr. Ahearn went to his desk and dug through a whole bunch of papers and finally gave Merritt the revised lengths. Merritt and I thereupon left and went back to Seattle.

Q. Now, at that time, Mr. Novich, was the [191] difference in the price of cable discussed, between paper-wrapped and latex?

A. At the time the order was placed?

Q. Yes.           A. Yes, it was.

Q. And do you have any recollection as to the amount of money that was involved or discussed in the difference between the two types of cable?

A. The difference in the two types was discussed as \$5,000 difference, as I recall.



(Testimony of Edward Novich.)

Q. And how are you able to definitely fix that date as March 10 that you went over there?

A. Because of the order that I received for some ruby lighting fixtures on that date. [192]

\* \* \*

### Cross-Examination

By Mr. Hoof: [193]

\* \* \*

Q. Well, what would be your best estimate on time as to the hour of the day on the 11th when you arrived with Mr. Upson at Mr. Ahearn's place of business?

A. I wasn't in Mr. Ahearn's place of business on the 11th.

Q. On the 10th. Excuse me.

A. On the 10th, I would say it was probably in the [195] neighborhood of 1:30 or 2:00 o'clock.

The Court: Was it on the 10th that you had lunch on the ferry?

The Witness: Yes, sir.

Q. (By Mr. Hoof): About 1:30 or 2:00 o'clock.

A. Roughly.

Q. Now, how long did you remain in the shop?

A. Probably twenty-five to thirty minutes.

Q. During that time you have said that you were present, is that correct? A. That is correct.

Q. The entire period of time? A. Yes, sir.

Q. Mr. Upson was present the entire period of time? A. That is correct.

(Testimony of Edward Novich.)

Q. Mr. Rockwell was present, was he not, according to your testimony?

A. Not all of that time, no, sir.

Q. And how long was Mr. Rockwell there?

A. Mr. Rockwell came in some time between five or ten minutes after Merritt and I arrived.

Q. And was Mr. Ahearn there all the time?

A. Yes, sir. [196]

Q. Was Mrs. Ahearn there? A. No, sir.

Q. Was anyone else there?

A. At that time I don't believe so. I don't recall anyone else being in the shop.

Q. All right, sir. Now, your primary visitation to Bremerton was in connection with lighting fixtures that you have testified to?

A. That is correct, sir.

Q. And not in connection with this matter of the cable? A. No, sir.

Q. Will you tell me exactly what was said as between Mr. Ahearn and Mr. Upson regarding the latex cable in your presence?

A. At both meetings, sir?

Q. Sir? A. At both meetings?

Q. The first. I am taking the first meeting alone now, I would like to have you tell me.

A. I could not repeat Mr. Ahearn's exact words.

Q. I beg your pardon?

A. I would be unable to repeat Mr. Ahearn's exact words, sir. I don't have that good a memory.

Q. Well, will you give me, as best you can, [197] the conversation between Mr. Ahearn and Mr. Upson?

(Testimony of Edward Novich.)

A. Yes, sir. Mr. Ahearn, when we first came in, mentioned to Mr. Upson that they had received approval from the Navy to substitute the latex for the paper-wrapped, and, I believe, showed Mr. Upson that approval letter. Then Merritt and Mr. Ahearn discussed—let me rephrase that—Mr. Upson pointed out the price difference at that time, and just about then or a minute or so later, Mr. Rockwell came in. Mr. Rockwell entered the discussion, and as I recall, most of the discussion then, it was between Mr. Upson and Mr. Rockwell with Mr. Ahearn just standing by.

Q. And what discussion was had between Mr. Rockwell and Mr. Upson in Mr. Ahearn's presence?

A. Merely——

Q. Will you tell me what was said by whom to whom, if you can?

A. Yes. Mr. Rockwell made the statement that they would be unable to wait for the third quarter of '53 for the paper-wrapped cable, and that they ought to go ahead and get the latex cable ordered. However, he was not going to authorize that. It would be up to Mr. Ahearn.

Q. Now, at that time, was an order placed?

A. No, sir, it wasn't.

Q. Had Mr. Ahearn indicated any acquiescence at [198] that time?

A. Not to my knowledge, no.

Q. Then, you, Mr. Rockwell and Mr. Upson went for coffee?           A. Yes, sir.

Q. And how long were you at coffee?

(Testimony of Edward Novich.)

A. Oh, possibly fifteen or twenty minutes.

Q. From there, I think your testimony is that you proceeded to some store or building?

A. Yes. I believe it was the Market Basket Market.

Q. The what?

A. The Market Basket is the name of the store.

Q. That would be a store? A. Yes, sir.

Q. And did Mr. Upson accompany you?

A. Yes, sir. He did.

Q. Were you figuring a job at the Market Basket store for Mr. Ahearn?

A. Yes, sir. I was.

Q. Did you figure the job?

A. No, sir. I didn't.

Q. Did you ever furnish to Mr. Ahearn an estimate? A. No, sir. I didn't. [199]

\* \* \*

Mr. Hoof: I should like to have the witness handed, if you please, the Defendant's Exhibit No. A-1.

(Defendant's Exhibit No. A-1 handed to the witness.)

Q. (By Mr. Hoof): Mr. Novich, you now have Defendant's Exhibit A-1. That refers to ruby fixtures, I believe you testified? A. Yes. [200]

\* \* \*

Q. Now, Mr. Novich, with that exhibit before you, I will ask you whether or not that particular order was not placed with your firm for the benefit

(Testimony of Edward Novich.)

of Mr. Upson in the following—that Mr. Upson had a friend whom he wished to favor with some fixtures at a discount, and the particular order through Mr. Ahearn was written for that purpose?

A. That is essentially correct, sir. [201]

\* \* \*

Q. Do you recall the name of the store where you were to make a survey for lighting fixtures on behalf of the Ahearn Electric Company on the 10th day of March, 1952?

A. I have testified I thought the name was the Market Basket, sir. [202]

\* \* \*

Q. I am going to suggest the name of the Thrift Market to you and ask you whether or not that is the store you surveyed?

A. That would be possible. I believe I stated that I thought the name was the Market Basket. I may have been mistaken. [203]

\* \* \*

Q. Did you submit a figure on the lighting of the Thrift Market to Mr. Ahearn?

A. No, sir, I didn't.

Q. You did not.                      A. No, sir.

Q. Did you verbally suggest to Mr. Ahearn the prices of the fixtures for the Thrift Market?

A. No, sir, I didn't. Mr. Hoof, if you would like to have the reason, I would be glad to give it to you. The man had already made arrangements to buy the fixtures from another contractor.



(Testimony of Edward Novich.)

Q. I beg your pardon?

A. The manager of the market had already made arrangements to buy the fixtures from another contractor. [205]

\* \* \*

Q. Now, one further question, I think, Mr. Novich. Could you in any way describe for me the other person, that is, you testified that you remembered some other person vaguely, as I recall your testimony? A. That is correct.

Q. That is, some other person being present, some other man, when you and Mr. Upson were at the shop. Could you describe him at all to me as to age, height, or physical characteristics?

A. I could make no positive identification, [207] sir, inasmuch as this person was in the background. I vaguely recall someone working in the shop the second time we were there at Mr. Ahearn's.

Q. Do you recall anything about his physical characteristics?

A. No, sir. I have since met him and heard that he was there, but I can't definitely recall it, that he was the person that was present.

Q. I beg your pardon?

A. I can't definitely state that Mr. Blackman was the person present. [208]

\* \* \*

## “LAWRENCE B. BLACKMAN

“called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows: [210]

## “Direct Examination

“By Mr. Lane:

\* \* \*

“Question: How old are you, Mr. Blackman?

“Answer: Thirty-nine.

“Question: Are you acquainted with John [211]  
V. Ahearn?            Answer: I am.

“Question: In what way are you acquainted with him?

“Answer: I worked for him for about a year; and I also had a re-wind shop, there.

“Question: A re-wind shop where?

“Answer: In Ahearn’s place of business,—and an appliance repair, together.

“Question: By a re-wind shop you mean re-winding what?            Answer: Motors.

“Question: Electric motors?

“Answer: That is right.

“Question: Mr. Ahearn was an electrical contractor was he?            Answer: That is right.

“Question: During what time did you work for him, do you recall?

“Answer: Let’s see, now. I went to work for him around in December of ’51. I worked for him until some time in December in ’53. [212]

\* \* \*

(Deposition of Lawrence B. Blackman.)

“Question: Were you with Mr. Ahearn at the time he received quotations from Westinghouse Electric Supply Company?

“Answer: Yes. They were received in the shop of Ahearn’s. I was there at the time.

“Question: Were you there at the time the quotations came in by mail?      Answer: I was.

“Question: Did you see the quotations, at that time?      Answer: I did.

“Question: I show you, Mr. Blackman, what has been marked for identification as Plaintiff’s Exhibit B and ask you if that is the quotation that Mr. Rockwell received from Westinghouse, at that time?”

Mr. Lane: I was going to get the correct [214] number of that now for your Honor’s convenience. I believe that is Plaintiff’s Exhibit No. 3. I presume that we substitute——

The Court: When reading, you should read what is now the number and not what was used to be the number.

Mr. Lane: At the bottom of Page 5, Exhibit B should read Exhibit 3 now, your Honor.

The Court: Let the record show that. Hereafter, instead of B, say 3.

“Mr. Hoof: Are we talking about Rockwell or Ahearn?

“Mr. Lane: I mean——”

The Court: You settled that when you said Ahearn.

(Deposition of Lawrence B. Blackman.)

Mr. Lane: "Rockwell" up above on the first line should be "Ahearn" too.

The Court: Let the record show that and read the answer at Line 7.

"Answer: Yes, I have seen this a number of times.

"Question: (By Mr. Lane): Did Mr. Ahearn discuss [215] this quotation with you, at that time?

"Answer: Not so much with me as it was with Mr. Rockwell. I was a bystander, listening in.

"Question: Was there any discussion, at that time, as to the use of paper-wrapped lead cable and latex-covered cable?

"Answer: There was by Mr. Ahearn, but he just laughed and said that it was so high priced that anybody would be a fool to put it in when they could put in paper and lead.

"Question: He was referring to what?

"Answer: The telephone cable, at the time.

"Question: What was he referring to when you say that it was so high?

"Answer: The difference in price.

"Question: Between the two?

"Answer: Yes; between the latex and lead or the paper and lead.

"Question: Do you have any recollection of a meeting in Mr. Ahearn's office, later, with reference to the use of latex or paper-wrapped wire?

"Answer: The only meeting that I know of was the one between him and Merritt.

"Question: Do you mean Mr. Ahearn and Mer-

(Deposition of Lawrence B. Blackman.)

ritt?           Answer:   Yes, that is right. [216]

“Question:   Do you know what occurred, at that time?

“Answer:   Mr. Ahearn was kind of mad at Rockwell, and said that he would show him who was boss, and that he was ordering the latex because he wasn’t going to wait another year before he could draw his money.

“Question:   Could you place the time of that meeting?

“Answer:   That was somewhere in March or April. I couldn’t place the date exactly as I never put any emphasis on it, at the time

“Question:   Well, let me ask you this question: At that time, Merritt Upson came over from Seattle, did he not?

“Answer:   Yes,—with another man with him.

“Question:   Do you recall that man’s name?

“Answer:   No. I don’t recall his name.

“Question:   Do you recall whether Mr. Upson, at that time, gave to Mr. Ahearn a letter (Handing copy of letter to the witness)?

“Answer:   Yes. I have seen this letter, here.

“Question:   I show you what has been marked as Plaintiff’s Exhibit E——” [217]

The Court:   Has E been marked by any other name or number?

Mr. Lane:   “E” is now known as 8, your Honor.

The Court:   Let the record show that. Hereafter when you mention “E,” speak of 8.



(Deposition of Lawrence B. Blackman.)

“Question: —and ask you if you have seen that before and when you saw it?

“Answer: I have seen that. I saw that letter in the first portion of the year, right after it came. I think it was on the same day that it was opened.

“Question: At that time, that Mr. Upson was there, what was the discussion between he and Mr. Ahearn?

“Answer: That is, during the ordering of the latex?

“Question: Yes.

“Answer: Well, he said that he wasn't going to wait the year; that he was going to show Mr. Rockwell who was boss and told Merritt to go ahead and order it, and placed the order with Merritt, at that time. But he had quite a bit of trouble finding the information as to the lengths of it because he had had two or three coffee royals, at the time, and I had to help him find measurements of the wire so that Merritt could get the lengths that were needed in the yard. [218]

“Question: Had the amount of wire that was needed,—the amount of cable—had that been refigured?

“Answer: Yes, it was.

“Question: From the time of the original estimate?

“Answer: That is right; right after Mr. Rockwell had got some changes through, why, we went down and re-measured them again so that there would be no waste.

(Deposition of Lawrence B. Blackman.)

“Question: And you helped re-measure that?

“Answer: I did.

“Question: With Mr. Rockwell?

“Answer: That is right.

“Question: What was Mr. Rockwell’s position on this job?      Answer: Foreman.

“Question: Foreman of this job at the Navy Yard?

“Answer: Of this job; that is right.

“Question: You say that on this date that Mr. Upson was there, you had to look around and find Mr. Rockwell’s calculations to determine the correct amount of wire to order?

“Answer: That is right.

“Question: Were those amounts given to Mr. Upson? [219]

“Answer: They were.

“Question: Did you hear Mr. Ahearn make any statements as to ordering the wire?

“Answer: Yes. Mr. Ahearn gave him definite orders to send the Latex.

“Question: At that time, was there any discussion as to the price of the Latex?

“Answer: Yes. But Merritt, at that particular time, didn’t have the information on it—of what the cost was—and I know that he called Seattle and told Mr. Ahearn that he would be back as soon as he could get the definite cost on it.

“Question: So that on that day he did not have the definite costs on it?

“Answer: No, he didn’t: only approximate.

(Deposition of Lawrence B. Blackman.)

“Question: Was there any discussion as to the approximate cost?

“Answer: Yes, there was.

“Question: What was that discussion; what was the context of it?

“Answer: I don’t remember exactly what it was, but it sticks in my mind it was somewhere around \$5,000 difference.

“Question: Between what?

“Answer: Between paper and lead or latex and [220] lead.

“Question: You mentioned that there had been some changes made and that was one of the reasons why the amount of wire needed was different. What were those changes, do you recall?

“Answer: Well, they were in connection with the telephone cabinets; but I wasn’t given all of that information, at the time—just snatches of it here and there. All I knew of it, at the time, was that there were some changes in the telephone cabinets.

“Question: At that time, do you know whether or not Mr. Upson wrote out an order?

“Answer: Yes, he did.

“Question: Did he do it in your presence?

“Answer: He started in my presence. I don’t know whether the order was completed, but I do know that he started to write it out, because some of my work at that time in winding motors carried me into the back room and some portions of it I missed.

(Deposition of Lawrence B. Blackman.)

“Question: The room that you and Mr. Upson were in at the time you heard that conversation, how large was that room?

“Answer: That room was approximately ten by twelve, except that it had shelves down it on each side, and a desk across one end; and that just about took up [221] everything. On one side of that room I had my work bench. I had my rewind machine in the back room which was adjacent.

“Question: I show you what has been marked as Exhibit G”——

Mr. Lane: Exhibit G is now 10, your Honor.

The Court: Let the record show that, and hereafter you may refer to 10 when speaking of Exhibit G.

“Question: ——Mr. Blackman, and ask you if you have ever seen that before?

“Answer: Yes. This was the one that Merritt started to write out, while I was there.

“Question: In your presence?

“Answer: That is right. That is the one that we were getting the lengths for.

“Question: This order was written up under date of March 10, 1952. Would you state to the best of your recollection whether or not that was the date that Mr. Upson was in Mr. Ahearn's office?

“Answer: As far as the exact date, I naturally never made any note of it but, as near as I can tell, it would be somewhere in the approximate vicinity. It was March or April I know that it was done,

(Deposition of Lawrence B. Blackman.)

but I never [222] thought anything about it at the time other than just casual thought.

“Question: On that date what were you doing; how did you happen to be in Mr. Ahearn’s office?

“Answer: I was rewinding motors.

“Question: That was the second time that you had been in Mr. Ahearn’s office, rewinding motors, when Mr. Upson called, is that right?

“Answer: I was there most of the time when he called—either working on appliances or rewinding motors.

“Question: Do you know whether or not this Exhibit 10 was received by Mr. Ahearn in the mail?

“Answer: Yes. He had copies of that one.

“Question: And you saw the copies in his office in his files, did you?      Answer: Yes.

“Question: It had the price on and the quantities for the cable?

“Answer: The first copy that he had didn’t have the price on it. The price must have come later.

“Question: Did you see this Exhibit 10 with the prices on it?      Answer: Yes, I did.

“Question: Now I hand you what has been [223] marked as Exhibit H.”

The Court: Is that 11?

Mr. Lane: It is Exhibit 11, your Honor.

The Court: Let the record show that it has been changed in this trial to Plaintiff’s Exhibit No. 11.

“Mr. Lane: There is no question about these exhibits we are referring to, is there, Mr. Hoof?

“Mr. Hoof: No.



(Deposition of Lawrence B. Blackman.)

“Question (By Mr. Lane, continuing): Did you ever see that typewritten copy?

“Answer: No. I never happened to see this particular typewritten copy.

“Question: Do you know whether or not Mr. Ahearn contacted the Navy with reference to this change from paper-wrapped lead wire to latex covered wire?

“Answer: No. I don’t know whether he did or whether he had Mr. Rockwell do it. That I don’t know. But he was very adapted to where something could be changed from one to the other and specified, in the original specifications, he was very adapted to changing from one to the other because if he couldn’t get one he could get the other.”

Mr. Hoof: I am going to, at this time, [224] move to have the last portion of the answer after the words “That I don’t know,” the last portion of the answer, stricken as not responsive to the question, commencing with the words “But he was very adapted to.”

The Court: I think that is something that is not called for by the question. It is stricken, and the Court will disregard it.

“Question: I believe you mentioned that there was a little ill feeling between Mr. Ahearn and Mr. Rockwell? Answer: That is right.

“Question: When did that occur and what caused it, do you recall?

“Answer: That was caused by Mr. Ahearn going

(Deposition of Lawrence B. Blackman.)

in the Navy Yard in an intoxicated condition. Some of the guards and inspectors there didn't like it."

Mr. Hoof: Well, I think I had better object now, at this time, your Honor, to any question of Mr. Ahearn going into the Yard in an intoxicated condition insofar as the testimony of Mr. Blackman is concerned. The later examination, as I recall, shows that he had no personal knowledge. I may be mistaken. However, I believe it shows he had [225] no personal knowledge of any such event occurring. I could be mistaken on that.

The Court: That motion is denied.

"Question: How would that affect the relationship between Mr. Rockwell and Mr. Ahearn?

"Answer: I guess they expected Mr. Rockwell to cover up for him, but he wouldn't do it.

"Question: Do you know when the cable arrived on the job?

"Answer: That was in the latter part of December or the first part of—

"Question: That is December of 1952?

"Answer: Yes—or the first of January. It was right around in there close. It seems to me it came just before or just after the holidays.

"Question: Do you know whether the cable stayed there for any length of time before it was pulled?

"Answer: To the best of my recollection it was about two weeks that it set there. The day that it come, I know Mr. Rockwell got a little excited and

(Deposition of Lawrence B. Blackman.)

called Seattle about it. And the next day Merritt was over. [226]

\* \* \*

“Question: Do you recall of any conversation, after the cable came, about the price of it—the increased cost?

“Answer: No. After the cable come, why he didn’t say much about that. As a matter of fact, I wasn’t very closely connected with him, then.

“Question: You had left him, had you?

“Answer: I had left him and was working for Mr. Rockwell, then, in his new establishment.

“Question: Then you did work with Mr. Rockwell in pulling the wire, did you? [227]

“Answer: I did.

“Question: And at that time you were working for Mr. Rockwell instead of Mr. Ahearn, is that it?

“Answer: That is right.

\* \* \*

“Question: Do you know whether it was customary for him to receive from Westinghouse copies of the orders that were placed with Westinghouse?

“Answer: Oh, yes. A lot of them he threw in the wastepaper basket when they came. I had to dig them out of the wastepaper basket at times for Rocky—for the information he wanted.

“Question: I show you what has been marked document that would come from Westinghouse?”

(Deposition of Lawrence B. Blackman.)

Mr. Lane: I think that is Exhibit No. 14, your Honor, if I am not mistaken.

The Court: No. 14 is the group of [228] orange-colored sheets of paper.

Mr. Lane: Yes, that is it.

“Answer: Yes; that is the type. Maybe there are some in here that I have actually seen before. The third sheet, here I have seen it before; the fourth sheet; the fifth one; and the sixth sheet, here, I have seen that before; the seventh one, I have seen that one; I have seen the ninth one, here, too. I have seen the tenth one; and the eleventh one; and the twelfth one; the thirteenth one; the fourteenth one; the fifteenth one; the sixteenth one and the seventeenth one. I have seen that many of them that I know definitely I have seen them.

“Question: Did Mr. Ahearn keep his records in this room, in which your workshop was located, on this job?

“Answer: No. Part of the records were in there. He kept some of them in the oven that he was using for an extra desk, there.

“Question: The oven of what, now?

“Answer: The oven of a new range that he had there for sale. Some of them he kept in the drawer and some of them he stuck in his pocket. When we did search, we searched all over every place, including the [229] wastebasket.

“Question: Do you say that he threw copies of these orders in various places, including the waste-paper basket, at times?

(Deposition of Lawrence B. Blackman.)

“Answer: Yes. Some of the copies I dug out of the wastepaper basket so that Rocky could check the material. [230]

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“Cross-Examination

“By Mr. Hoof:

“Question: Mr. Blackman, by whom are you employed, now?

“Answer: I am employed by Mr. Rockwell, right now.

“Question: How long have you been employed by Mr. Rockwell?

“Answer: Let's see; I went on with him right after the first of the year, when we finished with Mr. Aiken.”

Mr. Lane: I think that should be Ahearn, should it not?

Mr. Hoof: I think that is correct. [231]

\* \* \*

“Question: And you have been a steady employee of his ever since, have you?

“Answer: That is right, sir.

“Question: With whom have you talked concerning your deposition immediately prior to the taking of your deposition?

“Answer: We came in here this morning and talked about it.

“Question: Mr. Lane?                      Answer: Yes.

“Question: Mr. Rockwell?



(Deposition of Lawrence B. Blackman.)

“Answer: Just this morning.

“Question: Mr. Rockwell, too?

“Answer: Yes; he was here.

“Question: Was Mr. Flechsig here?

“Answer: Merritt was here and all of these other fellows here were in, and there was one more man from Westinghouse.

“Question: At that time, did you take a look at Exhibit 3?      Answer: Which one is 3?

“(Document handed to the witness.)

“Question: At that time, did you take a look at [232] Exhibit 3?      Answer: Yes, I did.

“Question: Did you also take a look at Exhibit 8 (indicating document to the witness)?

“Answer: Yes, I did.

“Question: Did you take a look at Exhibit 10 (indicating document to the witness)?

“Answer: Yes, I did.”

Mr. Lane: Your Honor, I have no way of checking these numbers.

Mr. Hoof: I am taking them from where you marked them.

Mr. Lane: I presume they are right.

“Question: Did you take a look at Exhibit 11 (indicating document to the witness)?

“Answer: Yes; I looked at it.

“Question: Then you took a look also at Exhibit 14 (indicating document to the witness)?

“Answer: That is right.

“Question: Of the four or five exhibits, here,

(Deposition of Lawrence B. Blackman.)

that have been just listed, being Exhibits 3, 6, 10, 11 and 14—and I am now going to hand the group over to you—which of these records, if you will tell me, please, are records of the Ahearn Electric Company? [233]

“Answer: Do you mean that should be in his files or that I have seen in his files?

“Question: Which of those records are records of the Ahearn Electric Company?

“Answer: I would like to get that defined a little more so that I understand just what you mean.

“Question: It is very simple. I want you to tell me which of these documents that I have handed you are records of the Ahearn Electric Company.

“Mr. Lane: If you know.

“Answer: Well, I know that most of these in Exhibit 14 were in his records, in his files.

“Question (by Mr. Hoof): They are from the files of Ahearn?

“Answer: They were in his files.

“Question: Were these particular records in his files?

“Answer: They may be copies of what were in his files. I may not know one sheet from the other, as far as actually being in his files is concerned.

“Question: Was that Exhibit 11?

“Answer: This is Exhibit 14—that he had copies of this or that he did have them in his files. This one here, which is marked Exhibit 11, I have never seen that one before. And this one here, which [234]

(Deposition of Lawrence B. Blackman.)

is Exhibit 10—the one that he had in his file was a different colored copy.

“Mr. Lane: What color was it, if you remember?

“The Witness: If I recall correctly, it was yellow.

“Answer (Continuing): And this one here which is Exhibit 6 looks to be a copy of the one that he had in his files. And this one which is marked Exhibit 3 looks just like the one he had in his file or a copy thereof.

“Question: You understand that you are under oath?      Answer: That is right.

“Question: Exhibit 11 is the one that you said you never saw before?

“Answer: That is right.

“Question: With reference to the rest of the documents that we have just referred to, are you prepared to state under oath that they are exact duplicates of documents that you have previously seen in the Ahearn files?

“Answer: All except those that I did not mention of it—let’s see, I believe that is Exhibit 14—there are some of those that I didn’t mention previously that I don’t remember seeing. Those [235] that I did remember seeing, I stated so by the number of the page that it was on—numbering from the top down.

“Question: How long has it been, up until this morning, since you have seen documents such as these or similar to these?

(Deposition of Lawrence B. Blackman.)

“Answer: I am in and out of the shop all of the time and they still come into Rockwell’s shop from different companies like that.

“Question: I am speaking of these exhibits just referred to; how long has it been since you have seen anything like this?

“Answer: Since I have seen those, it has been about a year or maybe a little bit longer than a year.

“Question: Is it considerably longer than a year?

“Answer: Yes, it is longer than a year. [236]

\* \* \*

“Question: What trouble did you have with Mr. Ahearn?

“Answer: Well, as far as that goes, when I would repair an appliance or something, Mr. Ahearn was very adapted to destroying the ticket and putting the money in his pocket.

“Question: How long did such events occur?

“Answer: I would say about six months before I left him. [237]

“Question: Was that the reason you left?

“Answer: No.

“Question: Why did you leave him?

“Answer: Because he was going to close up his shop, and I was tired of it anyway, and Mr. Rockwell was going to open his, so I decided it was a darned good time to get away from him.

“Question: As a matter of fact, Mr. Ahearn was a benefactor of yours, was he not?

(Deposition of Lawrence B. Blackman.)

“Answer: No.

“Question: What is that?

“Answer: I don’t consider him as such.

“Mr. Lane: Counsel, what do you mean by benefactor? I don’t know and I don’t know that the witness knows.

“Mr. Hoof: I think he understands.

“Mr. Lane: Well, I don’t understand, and if I don’t, maybe he doesn’t.

“Mr. Hoof: He has answered the question.

“Question (By Mr. Hoof): You had no work when you went to work for Mr. Ahearn?

“Answer: I had been working for Mr. King, previous to my employment with him, and I went up there at that time of the year to find out if there was anything that he had. [238]

“Question: Well, Mr. King discharged you, did he not?      Answer: That is right.

“Question: So you were without employment?

“Answer: I was without employment, at the time.

“Question: Do you know why Mr. King discharged you?

“Answer: That is right; on account of union activities.

“Question: You went to Mr. Ahearn and he allowed you to set up your own shop?

“Answer: He put me to work, first; and then I set up my shop a couple of months later.

“Question: He allowed you to run your shop in his place upon a percentage basis?



(Deposition of Lawrence B. Blackman.)

“Answer: That is right; upon a percentage basis, and that I pay 25% of the phone bill, which I did.

“Question: Your contention is that you left Mr. Ahearn because he was stealing from you?

“Answer: No. I said I did not leave him for that reason. I knew he was doing it.

“Question: Can you establish any particular theft?

“Answer: I could establish a number of them, but I don't care to press charges and go into [239] that, unless it is necessary.

“Question: I am going to come back to that in just a little bit. Now, the testimony of Mr. Upson was that he was in Bremerton on the 10th day of March, 1952, with reference to the matter of the telephone cable. Mr. Upson has testified to that date. Mr. Upson has testified that that is the date that he discussed the matter of changing the cable from the paper-sheathed to the latex. Is that the date you were present?

“Answer: I believe it was.

“Question: Who else was present?

“Answer: Mr. John Ahearn, myself, Merritt and one more man from Westinghouse that had come over to estimate some lighting in one of the downtown stores.

“Question: Where were you?

“Answer: I was in Ahearn's establishment there, winding motors.

(Deposition of Lawrence B. Blackman.)

“Question: Where was the winding shop with reference to the room where the discussion is said to have taken place?

“Answer: Right in the room.

“Question: In the same room?

“Answer: That is right.

“Question: How many hours did you wind motors that day? [240]

“Answer: Oh, I don't know. As a usual rule, about that time of the year, I was winding until quite late at night—sometimes to as late as nine o'clock.

“Question: What time did you start winding motors in the shop, there?

“Answer: I usually started in around seven or seven-thirty and sometimes worked as high as up past nine or nine-thirty, depending on the way the load went.

“Question: On this particular date, how many discussions took place between Mr. Ahearn and Mr. Upson, that is, I am speaking of how many separate occasions was there a discussion in the office?

“Answer: Only the one that I seen.

“Question: What time of the day was that, please?

“Answer: If I remember rightly, it was right after dinner.

“Question: Would that be at or around twelve o'clock noon or thereafter?

“Answer: Yes; between 12:30 and 2:00—somewhere around in there.

(Deposition of Lawrence B. Blackman.)

“Question: Was there any discussion in the morning of that day?

“Answer: Not between Merritt—or between the Westinghouse representative and John, that I know of. [241]

“Question: Were you in the winding then?

“Answer: I was back and forth between where my winding machine was located and the front, where I done my winding. You see, I made the coils in the back. There were a lot of times people would come in when he was there and I would wind coils, and the noise of the machine sometimes made it impossible for me to hear what was going on. As a matter of fact, I never paid much attention, anyway. It was only when I was laying the coils of wire in the motor and taping them up that things were quiet, there, and I could hear everything that went on.

“Question: Were you there all of that afternoon from lunch time on?

“Answer: Yes, as near as I can recall.

“Question: Was there a time book kept on your hours as to where you were employed and otherwise?

“Answer: No, there wasn't. Because the re-wind portion of it, I done it as I felt like. If Mr. Ahearn had a call job for me to go out on, I would go out on the call job. When there was no call job to go on, I was winding or repairing appliances.

“Question: Other than repairing appliances was a time book kept?

(Deposition of Lawrence B. Blackman.)

“Answer: Yes; there was a time book [242] kept. It was in Mr. Ahearn’s possession.

“Question: Who kept the time book?

“Answer: I kept the time book for him.

“Question: You marked down your hours did you?

“Answer: That is right; any time that I was there.”

The Clerk: Defendant’s Exhibit No. A-2 .

(Time book marked Defendant’s Exhibit No. A-2 for identification.)

“Question (By Mr. Hoof): I am going to hand you what has been marked as Exhibit A-2 for identification and ask you to state what that is, if you know.

“Answer: This is the time book.

“Question: The one that we just referred to?

“Answer: The one that we just referred to. I notice that there are a number of entries here, too, that are not even in my handwriting.

“Question: I want you specifically to turn to the month of March, 1952, and I want you to refer to the day of March 10th. For your convenience I am going to lift the payroll receipt up. (Lifting small pink slip of paper.) The sheet that I have now referred you to—which I am going to later ask the reporter to mark [243] and which has attached to it the pink sheet—is your time sheet for the days of March 10th, 11th, 12th, 13th, 14th, and 15th, 1952, are they not?”

(Deposition of Lawrence B. Blackman.)

Mr. Hoof: Now, I wonder, on the page with the pink sheet on it, since the reporter marked that page, whether or not I could have it marked by the Clerk so there will be no question as to the sheet that is under discussion.

The Court: Let it be marked.

The Clerk: Defendant's Exhibit A-2.

(Pink sheet in time book likewise marked Defendant's Exhibit No. A-2 for identification.)

"Answer: Let me check back and make sure. (Perusing time book.) This one is January. This one is for February. This is the first of March. Yes; that would be the 10th of March.

"Question: Under date of March 10th it says, "Navy Yard 8 hours," does it not?

"Answer: That is right.

"Question: Under date of March 11th, "Navy Yard, 8 hours"? Answer: That is right.

"Question: Under date of March 12th, "Navy Yard, [244] 4 hours"?

"Answer: That is right.

"Question: And then after the "4 hours," hours allocated to other particular work?

"Answer: That is right.

"Question: And then again on the 13th, "Navy Yard, 8 hours"? Answer: That is right.

"Question: What this book says and what it means, Mr. Blackman, is it not——

"Answer: I am not saying it was March 10th. It was approximately around about that date. But



(Deposition of Lawrence B. Blackman.)

I was in the shop the day he was in there and I heard that. And I found the necessary lengths out of the book. I might explain this, too. Many times I would work in the Navy Yard and come into the shop on other things for shop work and take it back into the yard, too. That is also listed under Navy Yard work.

“Question: The 8 hours and the 8 hours and the 4 hours are in your handwriting, are they not?

“Answer: That is right; they are.

“Question: So that you allocated yourself 8 hours to Navy work on that particular date—on the 11th of March, 1952?

“Answer: That is right. [245]

“Question: The same on the 10th?

“Answer: That is right.

“Question: I want you to look at this, if you will, please, Mr. Blackman, and where the reporter has marked Exhibit A-2 in the Exhibit A-2, that is the page we have been referring to?

“Answer: That is right.

“Question: Are you able specifically to tell me, Mr. Blackman, what work at the Navy Yard you were doing on March 10, 1952, or March 11, 1952?

“Answer: No, I couldn't tell you exactly or specifically what I was doing.

“Question: Do you think that the meeting you have referred to might have occurred upon some other date?

“Answer: It could be a few days previous or it could be a few days later.

(Deposition of Lawrence B. Blackman.)

“Question: From reference to your time book, would you not think it might be some other date?

“Answer: I would think so.

“Question: And your normal reaction, from looking at the time book, would be that your day would be devoted to Yard work, on those two dates at least?

“Answer: Yes; on those two days I imagine it would have been. [246]

\* \* \*

“Question: Any work you might have done in the shop, though, for the Navy Yard job, Mr. Blackman, would it not be done on the re-wind bench?”

\* \* \*

“Answer: It would not be done on the re-wind bench, but it would be in the shop because we had a very limited amount of space to do that work in the shop. [247]

\* \* \*

“Question: How did you happen to come to Seattle to testify in this matter?

“Answer: Mr. Rockwell asked me if I would come.

“Question: And he being your employer, you acquiesced?

“Answer: I told him yes I would come. [248]

\* \* \*

“Question (By Mr. Hoof): You testified that on the day in question—and we are now speaking

(Deposition of Lawrence B. Blackman.)

about the 10th day of March, 1952—that Mr. Ahearn had had two or three coffee royals?

“Answer: That is right; I did.

“Question: Where did he have those?

“Answer: At the little restaurant and bar which was between 4th and 5th on Broadway.

“Question: What was the name of that place?

“Answer: I don’t recall the name of that little restaurant, right now.

“Question: What time did Mr. Ahearn have the coffee royals?

“Answer: Well, if I kept track of what times he had coffee royals, I would have an awful time.

“Question: At what time on this day did Mr. Ahearn have the coffee royals?

“Answer: I know he had some around noon.

“Question: Were you present with him?

“Answer: Yes. I went down and had a cup of coffee with him.

“Question: At what time? [249]

“Answer: It was somewhere around noon.

“Question: Was he competent or was he incompetent by virtue of these coffee royals?

“Answer: I would say that most of the time it didn’t have too much effect on him except that he wasn’t good to navigate on his feet. He seemed to be fairly clear headed even when he did have a number of them. He just didn’t seem to be able to get around good.

“Question: Did Mr. Ahearn have coffee with Mr.

(Deposition of Lawrence B. Blackman.)

Upson or the other gentleman that was along, Mr. Novich?

“Answer: At the time he had those, I don’t believe they were along. It was just Mr. Ahearn and myself at that particular time.

“Question: Would you fix it as immediately after lunch on that day that Mr. Ahearn discussed this matter with Mr. Upson and the other man?

“Answer: I would say it was closer to 2:00 o’clock.

“Question: Two o’clock?

“Answer: It was in the afternoon; yes.

“Question: You are positive, of course, that there were the four of you present when this discussion took place?

“Answer: Yes. The thing that recalls it clearest to my memory, that the cable was brought up, [250] was because we had an awful time finding the measurements. I was just about to give up and go into the Navy Yard and get hold of Mr. Rockwell to get the measurements all over again, because we were having so much difficulty finding the lengths.

“Question: You are positive that the other gentleman from Westinghouse was present as you say, when the agreement was made?

\* \* \*

“Question: Is the little restaurant that you are referring to the one at which you had coffee frequently or lunch frequently?

“Answer: Yes. I had lunch in there a number of times. When there was nothing to do, I would drop

(Deposition of Lawrence B. Blackman.)

down to have a cup of coffee. And I used to eat dinner down there any time that I had to stay over late, in the evening or something. I would stop down to have a meal. [251]

\* \* \*

“Question: And you can’t remember the name of it?

“Answer: I don’t recall what the name of it was.

“Question: You are still, however, able to remember the exact sheets from Exhibit 14?

“Answer: If you had hunted through those things and tried to keep track of them for John as hard as I did, you would remember them, too,—that any time you seen a glance of anything like that, where you had to grab it and put it away for him, in order to keep the thing where he could find it, why, you would get acquainted with them, too.

“Question: You are positive, of course, in your own mind I imagine, that the fact you feel Mr. Ahearn, in effect, stole money from you through what you claim tearing up tickets and pocketing the money has nothing [252] to do with what you have stated here?

“Answer: Absolutely nothing. [253]

\* \* \*

“Question: When did Mrs. Ahearn come to the office for the purpose of typing and doing the office work?

“Answer: She started doing the office work somewhere along in April, I do believe. It was somewhere in that vicinity.



(Deposition of Lawrence B. Blackman.)

“Question: Of 1952?

“Answer: Yes. She only come over there spasmodically, though. A big percentage of her work she did inside of the house, itself. After she once started, then she would bring the papers out there.

“Question: What do you mean ‘at the house,’—their home?

“Answer: Their home was right alongside of the shop. Sometimes she would take the papers over there and work on them and bring them back into the shop.

“Question: Did she keep the records from April, 1952?

“Answer: Yes; from then on she did all of the record keeping.

“Question: Could it be possible she started before then? [255]

“Answer: It could be possible she started some before that. I know I was very glad to get out of the job of typing some of them, as soon as she consented to come out and do that. I done it for the lack of having something to do, at times, just to help get the job under way. But I actually was glad to see Mrs. Ahearn get it.” [256]

\* \* \*

**“ARTHUR L. ROCKWELL**

“called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

**“Direct Examination**

“By Mr. Lane:

“Question: Would you state your name, please?

“Answer: Arthur L. Rockwell.

“Question: Where do you live, Mr. Rockwell?

“Answer: Moses Lake, Washington.

“Question: You have lived there for how long?

“Answer: A little over a year.

“Question: Previous to that time you lived where? [261]

“Answer: In Bremerton.

“Question: What business are you engaged in?

“Answer: Electric contracting business.

“Question: What is your age, Mr. Rockwell?

“Answer: Forty-six.

“Question: Were you acquainted with John V. Ahearn?      Answer: Yes, I was.

“Question: In what way are you acquainted with him?

“Answer: I have known him for several years. I worked for him in '52 and part of '53.

“Question: Did you work for him in connection with the repairs and installation of an electric distribution system in the Puget Sound Naval Shipyard?      Answer: I did.

“Question: That was a contract that he had in

(Deposition of Arthur L. Rockwell.)

1952 to repair and install their telephone system in their quarters area?

“Answer: Yes; telephone and power system.

“Question: Telephone and power?

“Answer: Yes.

“Question: Had you been with Mr. Ahearn prior to this job, Mr. Rockwell?

“Answer: A couple of months. [262]

“Question: Did you figure the estimates on this job? Answer: I did.

“Question: At whose request?

“Answer: Mr. Ahearn’s.

“Question: After figuring those estimates, will you state whether or not you requested a quotation from Westinghouse Electric Supply Company?

“Answer: I did.

“Question: Did you personally request a quotation for the Ahearn Electric Company from the Westinghouse Electric Supply Company, Mr. Rockwell? Answer: I did.

“Question: Do you recall who you talked with and when it was?

“Answer: I talked to Mr. Schindler, the take-off man at Westinghouse, about two weeks before the letting of the job, as I remember.

“Question: Did you ask him for a quotation?

“Answer: I did.

“Question: Was that quotation furnished to the Ahearn Electric Company by Westinghouse?

“Answer: Yes, it was.

“Question: I show you what has been marked as

(Deposition of Arthur L. Rockwell.)

Exhibit B, Mr. Rockwell, and ask you what that document [263] is, if you know?

“Answer: This is a Westinghouse quotation of some of the various materials to be used on the job. There were other materials to be used on the job that they didn’t furnish,—such as concrete, reinforcing steel, metal covers—manhole rings.

“Question: The date of that quotation was what?

“Answer: 31st of January, ’52.

“Question: Do you recall whether or not that was the approximate time that you got it?

“Answer: Yes, it was.

“Question: Was it sent in the mail or was it delivered?

“Answer: It was sent to Mr. Ahearn in the mail.

“Question: At the time you requested a quotation from Westinghouse, was there a request for a quotation on latex-covered cable?

“Answer: No.

“Question: Why not?

“Answer: Well, they don’t handle latex, to begin with. They quoted paper and lead, and paper and lead was approximately—as I remember—about five thousand and some dollars cheaper than latex.

“Question: Was that discussed between you and [264] Mr. Ahearn, if you recall?

“Answer: The prices and everything were brought up, figuring paper and lead. I never considered latex because of the price.

“Question: Did you get quotations from any other electric supply people?

(Deposition of Arthur L. Rockwell.)

“Answer: We did. We received them from Graybar,—and there was ‘G. E.’ and another company. I don’t remember the name of it but there were several quotations.

“Question: You saw this quotation that came in from Westinghouse, did you, Mr. Rockwell?

“Answer: Yes, sir.

“Question: You are positive that at that time a request was not made from Westinghouse for a quotation on latex, is that your testimony?

“Answer: That is right.

“Question: What was your position on the job, Mr. Rockwell?

“Answer: I was foreman on the job. [265]

\* \* \*

“Question: After these quotations came in, would you state whether or not there was a breakdown submitted to the Navy by the Ahearn Electric Company?

“Answer: After the letting of the contract there was a breakdown submitted to the Navy.

“Question: Based upon what?

“Answer: Paper and lead.

\* \* \*

“Question: Did you have any knowledge that he had ordered the latex covered wire in March, ’52?

“Answer: No. I didn’t know anything about any latex until January of ’53.

“Question: I see. So that during all of that year



(Deposition of Arthur L. Rockwell.)

you had no knowledge of latex having been ordered on the job, is that your testimony?

“Answer: No; I had no knowledge. [266]

\* \* \*

“Question: So that about October 1st the job was completed except for pulling this telephone cable?

“Answer: Yes,—except for miscellaneous little items to be taken care of.

“Question: Do you recall when the cable arrived?

“Answer: As I remember, it was right around New Years or right after the holidays.

“Question: Was the cable there at the job [267] for some time prior to being pulled?

“Answer: It was about a week or ten days it set there prior to the pulling of the wire.

“Question: You had ordered a considerable amount of the materials that were used in this job, had you not, Mr. Rockwell?

“Answer: I did, yes.

“Question: You had authority to order them?

“Answer: Yes, I did.

“Question: From Mr. Ahearn?

“Answer: Yes.

“Question: Is there any explanation or any reason why you did not order the latex wire?

“Answer: I had a twenty-five per cent interest in the job and there was a little over \$5,000 difference, and I saw my twenty-five per cent taking wings if that was ordered.

(Deposition of Arthur L. Rockwell.)

“Question: That differential in cost had been discussed between you and Mr. Ahearn, had it?

“Answer: Yes. I had explained to him the difference in the cost of latex and paper and lead telephone wire.

“Question: He was familiar with what latex cost, generally, was he not?

“Answer: Yes, he was. [268]

“Question: After the first of the year, January of '53, did you have occasion to call the Westinghouse people about the latex wire?

“Answer: Yes.

“Question: Who did you call and what was said?

“Answer: I called Mr. Flechsig on it and asked him how come the change. He didn't know anything about the change, and that is where the conversation ended as far as he and I were concerned.

“Question: Then do you know whether or not Mr. Upson came over to your plant shortly after that conversation?      Answer: Yes, he did.

“Question: Were you present at that time?

“Answer: Not all of the time. He talked to Ahearn most of the time. I had a crew working.

“Question: You were foreman of the crew on the job, were you not?      Answer: Yes, sir.

“Question: Did you have any conversation with Mr. Ahearn relative to pulling this wire after it arrived,—the latex wire?

“Answer: I wouldn't pull it because I thought there was some mix-up in the ordering of it. At the end of about ten days the Navy said, 'Either pull it

(Deposition of Arthur L. Rockwell.)

or get [269] it off the premises.' The morning we set up the reels to pull it, I got called down to the contracting section. Ahearn took the crew over and he pulled the first stretch there in between the first two manholes and got them in wrong and I had to pull it out and do it over again.

"Question: Then, as I understand, he pulled the first wire, in your absence? Answer: Yes.

"Question: And it was pulled wrong, you say?

"Answer: Yes. The wrong lengths were pulled in. I pulled it out. There were various lengths to fit the distances in between the manholes.

"Question: After this wire arrived or after any material arrived, was it necessary to make a report to the Navy Department as to the material on hand?

"Answer: It was.

"Question: Who made out those reports?

"Answer: All we did,—we called the inspector and he would come up and check the material and see whether it would be approved for the job; then he would make a listing of it. He generally wanted the shipping invoice and he would take that and make a list of it.

"Question: Did you make a report to the Navy inspector in connection with this latex?

"Answer: I did, yes. [270]

"Question: Did he come up then?

"Answer: He came up and checked the quantities.

"Question: Is that the man from the Navy who either told you to pull the wire or get it off the job?

(Deposition of Arthur L. Rockwell.)

“Answer: Yes.

“Question: To whom did he make that statement,—to you? Answer: To me, yes.

“Question: Was Mr. Ahearn present?

“Answer: No. I informed Mr. Ahearn of it.

“Question: Mr. Rockwell, I will ask you to state whether or not, before the wire was pulled, an estimate or a document was filed with the Navy in connection with a draw for the latex wire?

“Answer: There was.

“Question: What are those called?

“Answer: They are estimate payments is what they are.

“Question: Estimate payments?

“Answer: Yes. When you set the material on the job, the Navy will pay you all but about ten per cent of the material setting on the job as per your invoice, plus whatever work you have completed during a period of time. Generally, it is figured out on a monthly basis. [271]

“Question: Was such an estimate filed with the Navy in connection with this latex wire?

“Answer: There was, yes.

“Question: Was that before or after the wire was pulled?

“Answer: The estimate was filed before the wire was pulled but I don't believe Ahearn was paid for it prior to the pulling of the wire. But the estimate was filed prior to the pulling of the wire.

“Question: You prepared the estimate, did you?

“Answer: Yes. I sketched it out and then I gave

(Deposition of Arthur L. Rockwell.)

it to him. He would type it out and sign it and give it back to me and I would take it to the Contracting Section.

“Question: By ‘him’ you are referring to Mr. Ahearn?            Answer: Yes.

“Question: So he had knowledge of this, did he?

“Answer: Yes.

“Question: Do you recall the amount of money involved in connection with it?

“Answer: As I recall, it was roughly around \$10,000.

“Question: Do you recall what figure was used for the cost of the latex wire? [272]

“Answer: Around \$7,500. They were never very accurate on their estimates,—just so you didn’t go over what you had,—they never questioned one way or the other. Then it was cleaned up at the end of the job.

“Question: Would you state whether or not you ever had any conversation with Mr. Ahearn with reference to the payment of this latex wire?

“Answer: After the wire was pulled, all he told me, he said, ‘I am not going to pay for that latex.’ He said, ‘I have got a boy working for Westinghouse and he will see that I don’t have to.’

“Question: That was after the wire was pulled?

“Answer: That was after the wire was pulled and spliced.

“Question: Was that the first time that he had indicated to you that he did not intend to pay for the latex?            Answer: That is right.



(Deposition of Arthur L. Rockwell.)

“Question: As I understand your testimony, you had no knowledge that the latex wire had been ordered until shortly after the first of the year, '53?

“Answer: That is right.

“Question: Mr. Ahearn had never advised you that he ordered it back in February or March, 1952?

“Answer: No, he hadn't. [273]

“Question: Is there any reason or explanation that you might have for him not giving you that information?

“Answer: In September—the latter part of September—when we were splicing the secondary 600-volt wire, I hired some cable splicers on a week end. I told him I was going to splice cable on the week end, and he said that was all right. The labor bill for the splicing of all this wire ran about \$600. Then he sent me a registered letter, drawn up by attorney Wallace stating that I had no authority on the job any more, one way or the other, and that this \$600 would be taken out of my twenty-five per cent.

“Question: On what basis were you employed on the job?

“Answer: As a foreman and to receive twenty-five per cent of the net profit.

“Question: The net profit from that particular job? Answer: That is right.

“Question: Were you ever paid any profit by Mr. Ahearn? Answer: No.

“Question: Did Mr. Ahearn ever give you an accounting of the cost of the job? [274]

(Deposition of Arthur L. Rockwell.)

“Answer: I went out to his house, after he sold his shop, and we went over his books and tried to arrive at the net cost on the job. There were several instances where I found the payroll had been,—men that I had discharged were still kept on the payroll and charged to the Navy Yard job, and I just gave it up when I saw what was happening.

“Question: After they were discharged they were carried on the books?

“Answer: Yes. There were two men that I had discharged, and they went to his shop and drew time from his shop and he charged them to the Navy Yard job.

“Question: They worked at his shop rather than at the Navy Yard?      Answer: Yes. [275]

\* \* \*

“Question: Would you say that he kept very good books and records in connection with this job, Mr. Rockwell?

“Answer: No, I wouldn't. They were very poor books. Just with what small sketches I had on the job and the various amount of materials that were used, I showed a profit on the job. When he told me that there wasn't any profit on the job, why, I was quite astounded. The only thing that he offered to offset that was the large labor bill.

“Question: I didn't understand your last answer, Mr Rockwell, where you said large labor.

“Answer: Mr. Ahearn discharged these men. These men were discharged and Mr. Ahearn was showing an excess of time—more than they worked

(Deposition of Arthur L. Rockwell.)

on the job. I didn't want to make a fuss about it.  
I just let the thing go. [276]

\* \* \*

“Cross-Examination

“By Mr. Hoof:

“Question: Will you give me the names of the two men that you mentioned whom you had discharged?

“Answer: I don't remember them right offhand. If I had the time books I could——

“Question: Do you remember their nicknames or anything that would describe them?

“Answer: As I remember, one of them was Jack. I don't remember what his last name was. I know the reason I discharged him, and I know that he worked for Ahearn for a month or so after that.

“Question: Could you give me the approximate date of his discharge?      Answer: No.

“Question: You can't give that?

“Answer: No.

“Question: Do you have any way to describe his physical characteristics?

“Answer: Any way to describe his what?

“Question: His physical characteristics so he might be identified.

“Answer: He was a darned poor [279] electrician.

“Question: No. I am speaking about physical identification.

“Answer: I don't know. I couldn't remember.

(Deposition of Arthur L. Rockwell.)

Roughly, I went through about thirty or forty men on the job.

“Question: Can you tell me when Jack approximately went on the job,—this person whom you referred to as Jack?      Answer: No, I couldn’t.

“Question: Do you have any identification of the other man at all; are you able to describe him to me?

“Answer: Of the other men?

“Question: The other man. There were two men that you said you had in mind in particular.

“Answer: No. The only reason I referred to that was why I never collected my twenty-five per cent.

“Question: I understand that. But can you describe the other man to me?

“Answer: The reason I noticed it, when I was checking over this labor bill, there were payrolls made out at all times, was that each one of these men,—they only worked on the job for about a week prior to my discharging them. Then it would show up as four or five weeks on Ahearn’s payroll.

“Question: I am going to hand you what has been [280] marked as Exhibit 20, Mr. Rockwell.”

Mr. Hoof: May it please the Court, that is the second sheet of the two sheets that were previously hooked together as Exhibit 20, and I wonder if we could have that identified as possibly Exhibit 20(a)?

The Court: Do you wish the Clerk to put 20(a) on the second page?

Mr. Hoof: Yes, and we will then so mark the deposition, because there was but one sheet handed to the witness at that time.

(Deposition of Arthur L. Rockwell.)

The Court: Is that agreeable, Mr. Lane?

Mr. Lane: Yes, your Honor.

The Court: Let the second portion of that exhibit previously marked Plaintiff's Exhibit 20 be marked 20(a).

(Letter dated January 26, 1953, being a part of Plaintiff's Exhibit No. 20, is further marked Plaintiff's Exhibit No. 20(a) for identification.)

"Question (Continued): Have you ever seen that document before? I want you to read it.

"(The witness peruses the document.)

"Answer: This letter was written—— [281]

"Question: Will you answer the question?

"Answer: What was it?

"Question: Have you ever seen it before?

"Answer: I saw it in the making but I never saw the finished product of it.

"Question: By in the making what do you mean—in the Navy Yard?

"Answer: In the Contract Section of the Navy Yard, yes.

"Question: You are using the date of the letter to refresh your memory,——

"Answer: I was.

"Question: No. I say I want you to use the date to refresh your memory.

"Answer: January 26th.

"Question: That letter is dated January 26th; now, the actual pulling of the wire did not start until after January 26th?



(Deposition of Arthur L. Rockwell.)

“Answer: Roughly around that time as I remember. The wire arrived the first week in January and it set there for a couple of weeks before it was ever touched. It never was touched until this letter was sent to Ahearn. Because I stated previous to this that I had furnished a breakdown of paper and lead to the Navy, and that is the reason for this letter. [282] Whenever you change any material one way or the other they have to check that even though it was in their general specifications prior to that.

“Question: I am now referring to the next to the last paragraph on page 2.

“Your attention is invited to Section 1.07 of Specification No. 30338 which states “Damage for delay in accordance with Article 11 of Form No. 197 shall be at the rate of \$40.00 per calendar day.” The contract completion date was 28 October, 1952, and it is useless to say that the work to date is not completed, which leaves the Officer-in-Charge of Construction no other alternative than to either charge liquidated damages or by supporting documents provided by your company to consider a time extension. It is appreciated, due to delays in delivery of some of the material, that the completion date of the contract was delayed and consideration will be given to a time extension for only this delayed material which is now actually at the job site. The Officer-in-Charge of Construction also at this time wants to make very clear that definitely no consideration will be given for a time extension for reordering any of the material now at the job site required under the sub-

(Deposition of Arthur L. Rockwell.)

ject contract. [283]

“ ‘In conclusion, you are requested to take the necessary action to install the specified materials and complete the work under the subject contract at the earliest possible date.’

“In other words, the Navy—in substance by this the Navy said, ‘Mr. Rockwell you do have on the site material which will comply with the specifications’?

“Answer: That is right.

“Question: Therefore you are required to proceed with installation of the material at this time or we will proceed to charge you \$40 a day penalty, that is right, isn’t it?      Answer: Yes.

“Question: Therefore this material was used?

“Answer: It was on the job site.

“Question: I appreciate it was on the job site. But it was after this letter that the wire was actually pulled and put into its proper places?

“Answer: That is right.” [284]

\* \* \*

### JOHN V. AHEARN, SR.

called as a witness by and on behalf of himself having been first duly sworn was examined and testified as follows:

#### Direct Examination

By Mr. Hoof:

Q. Will you state your name, please?

A. John V. Ahearn, Sr.

Q. And Mr. Ahearn, you are the defendant in this action or one of the defendants, I should say?

A. Yes, sir.

(Testimony of John V. Ahearn, Sr.)

Q. Mr. Ahearn, the contract that has been referred to here, which has been admitted into evidence as Exhibit 18, was performed by the Ahearn Electric Company, was it not? A. Yes, sir.

Q. And, Mr. Ahearn, you were the sole proprietor, were you not, of the Ahearn Electric Company during all times material to this litigation?

A. At the time, yes, sir.

Q. Now, Mr. Ahearn, with reference to [289] your residence, where do you now live?

A. At Route 6, Box 3172, Bremerton. That is five miles out from Bremerton.

\* \* \*

Q. At what period of time, Mr. Ahearn, did you move to the rural route address that you have now stated?

A. The latter part—around September—October—of 1951. [290]

\* \* \*

Q. During the period of time from the commencement of this contract to the conclusion, was the house rented to others? A. Yes, sir.

Q. That is the one adjacent to the shop?

A. Yes, sir. [291]

Q. Mr. Ahearn, handing you what has been marked for identification as Defendant's Exhibit No.—

Mr. Hoof: Mr. Clerk, what is that number?

The Clerk: A-3.

(Specifications Contract marked Defendant's Exhibit No. A-3 for identification.)

(Testimony of John V. Ahearn, Sr.)

Q. (Continued): Will you please state to me sir, what that is, if you know?

A. This is specifications on this Navy Yard job.

Q. Now, that is the contract?

A. The contract, yes.

Q. The contract out of which this litigation arises, at least the furnishing of the materials?

A. That is right.

Mr. Hoof: I should like to offer Defendant's Exhibit A-3.

Mr. Lane: I have no objection, your Honor.

The Court: Defendant's Exhibit A-3 is now admitted. [292]

\* \* \*

Q. Now, Mr. Ahearn, where did you obtain Plaintiff's Exhibit 3, being the quotation from the Westinghouse Company relative to prices for your bid?

A. I received it from Mr. Upson.

Q. And when did you receive it?

A. The bid opened February 1. I mean—yes, I had to be over in Seattle February 1, at 2:00 o'clock, and I had to have this specification on the prices there the day before.

Q. And how did you receive the quotation on prices?

A. They brought it over.

Q. Now when you say "they" who?

A. Mr. Upson brought it over.

Q. To you personally?

A. To me personally.

Q. And did you then, Mr. Ahearn, have any discussion with Mr. Upson relative to the quotations?

(Testimony of John V. Ahearn, Sr.)

A. Yes. He had all the prices for me to bid [294] on. I couldn't bid without having these prices, and that is how I have to arrive at my figure, which is fifty-one thousand, something like that. I had to get all these quotations and the breakdowns that I had, and I had to get this cable and transformer and boxes from them.

Q. Yes, sir. Now where did the discussion with Mr. Upson take place?

A. At 926-Sixth Street.

Q. In Bremerton? A. In Bremerton.

Q. And on what day, sir?

A. It was during the week.

Q. Well, what I am getting at, and I ask you to refer to the date of the quotation——

A. Well, on the last—day of this—31—I had to have this to be able to put in my bid, so he was there that day, the day before the bid was opened, which is on January 31.

Q. And the bid opening was February 1?

A. The bid was February 1, 1952, yes.

Q. Now, did you spend any time going over the various materials shown on Exhibit 3, the price quotation of Westinghouse, with Mr. Upson?

A. Yes, sir.

Q. And did you, sir, discuss the matter of [295] telephone cable? A. Yes, sir.

Q. Now, would you kindly refer to the third page of Exhibit No. 3, being the quotation, and I think you will note the following language is used with



(Testimony of John V. Ahearn, Sr.)

reference to paper wrapped lead wire. Do you find the item now that I am speaking of?

A. Yes, sir.

Q. (Reading): "Shipment—Telephone Cable—Third Quarter 1953." A. Yes, sir.

Q. (Reading): "Prices billed will be those in effect at time of shipment." "Orders on Telephone Cable should be placed direct with Graybar Electric Company, Seattle." A. Yes, sir.

Q. Do you find that? A. Yes, sir.

Q. Have I read it correctly? A. Correctly.

Q. Now, at that time, did you discuss the matter of the cable and the matter of ordering with Graybar and other matters in connection with it with Mr. Upson? A. I did, sir.

Q. Will you tell me what conversation you [296] had with Mr. Upson and who else, if anyone, were present?

A. I know my wife was present for one, and I was present. Rockwell was present. I think also Mr. Blackman was present.

Q. Now, what discussion was had with reference, that is by you, with Mr. Upson, with reference to the matter of the paper-covered lead-sheathed wire as to where the order should be placed and as to delivery dates?

A. I looked on this where it says "Orders for Telephone Cable should be placed direct with Graybar" and I mentioned to Mr. Upson at that time—I said: "I should get in touch with Graybar on this because it specifies on that—." And he said: "Never

(Testimony of John V. Ahearn, Sr.)

mind that." He says: "I will put it in one account, this Navy Yard account." And give me ninety days to be able to pay for it after I receive it from the Government, you know, and I says: "Well, it says from Graybar." Well, he said: "I can get it." And I said: "How can you get it? I should go to Graybar." He said: "No. Give it to us and we will have it all on one order." And I said: "You can't furnish it." And he said: "Yes." And I said: "Can you furnish it in this time specified in this specification? It states that the contract must be finished in August."

Q. Of what year, sir? [297]

A. Of 1952. So I took exception to this here on Graybar, and I wanted to give it to Graybar.

Q. What did Mr. Upson tell you with reference to his being able to secure the wire within time to complete the contract in August of 1952?

A. Well, I said: "Can you get it?" And he said: "Yes." "Can you get it on time so I can complete my contract?" And he said: "Yes."

Q. Now, as a result of that conversation, did you make a bid?           A. I did, sir.

Q. And what kind of wire did you bid?

A. I bid on the telephone cable paper wrapped at these prices that was quoted here.

Q. And, Mr. Ahearn, where was the bid depository? In other words, where were the bids to be sent or delivered?

A. Oh, the early morning——

Q. No.

(Testimony of John V. Ahearn, Sr.)

A. At six o'clock I had to catch a boat to Seattle.

Q. No, sir. Please answer the question.

A. At Seattle.

Q. At Seattle? A. Pier 99. [298]

Q. All right, sir. How did you get your bid there? A. Delivered in person.

Q. On what date? A. On February 1.

Q. And then, Mr. Ahearn, did you remain for the bid opening? A. I did, sir.

Q. And was the bid opening at 2:00 o'clock, February 1 of 1952? A. It was, sir.

Q. Were you the successful bidder?

A. I was the successful bidder.

Mr. Hoof: For convenience, I wonder if I might have the Exhibits. I think it would be of some assistance.

(All Exhibits are handed to Mr. Hoof.)

Q. (By Mr. Hoof): I am now handing you what is marked as Plaintiff's Exhibit No. 5, which is a carbon copy of the Westinghouse Electric Supply Company's list of materials dated February 5, 1952, Mr. Ahearn. A. I have it, sir.

Q. You have examined it now, Mr. Ahearn?

A. Yes, sir. [299]

Q. And the testimony has been that that was written up on or about February 5, 1952?

A. Yes, sir.

Q. (By Mr. Upson): Do you so testify yourself? A. I do, sir.

Q. And that Exhibit No. 5, the order for materials on the job from Westinghouse Supply Com-

(Testimony of John V. Ahearn, Sr.)

pany, calls for what kind of cable with reference to the telephone cable?

A. It calls for paper-wrapped lead cable, Western Electric type.

Q. Now, did you or Mr. Rockwell at or about that time notify the Navy Department of the material that you were to use?

A. Yes, sir. We had to make a breakdown, specifying each item, the amount of the item, the amount of installing, digging, transformer, cable, everything. There are quite a number of articles, and we had to submit that to the Government.

Q. What type of wire was specified in your breakdown?

A. Paper wrapped, Western Electric wire.

Q. Now, do you recall a gentleman by the name of Blackman being in your employ?

A. Yes, sir. [300]

Q. Do you recall approximately when he commenced work for your company?

A. Somewhere in the year 1950.

Q. And about how long did he remain in your employ?

A. Until October of 1952, when I sold out.

\* \* \*

Q. Did he work on the Navy Yard job, Mr. [301] Blackman?

A. He worked on the Navy Yard job, yes.

Q. And Mr. Ahearn, was there a time book kept in connection with his work?      A. Yes, sir.

(Testimony of John V. Ahearn, Sr.)

Q. I hand you what has been marked as Defendant's Exhibit No. A-2, which has previously been admitted into evidence, and I will ask you to examine that book and tell me what it is please?

A. (Examining Exhibit): Each mechanic that I have on the job has a book in the shop.

Q. Yes, sir, and will you tell me what that specific book is, if you will, please?

A. It is a time book. They mark their time down.

Q. And that is the time book of whom?

A. Of Mr. Blackman.

Q. Now, will you kindly find, if you will, please, the page in the book covering the month of March, 1952?

A. Yes, sir.

Q. Do you have that before you?

A. I have it.

Q. Now, that discloses for the day of March 10, what? What does that show with reference to the date of March 10? [302]

A. It shows eight hours in the Navy Yard.

Q. For whom? A. For Mr. Blackman.

Q. Now, with reference to the eight hours in the Navy Yard, are you able to tell me whether or not any Naval job work was at any time done by Mr. Blackman or by anyone else, insofar as the performance of the contract is concerned, in your shop?

A. None whatsoever.

Q. Was your shop at any time used for performing any of the Naval Yard job work?

A. None whatsoever.



(Testimony of John V. Ahearn, Sr.)

Q. Where was the performance on the Naval job of the work that was required to be done on the job actually done?      A. In the Navy Yard.

Q. And are you able to state from an examination of that book and from your knowledge of the work that went on where Mr. Blackman was during the working day of March 10 of 1952?

Mr. Lane: If your Honor please, I will object to that question unless the witness specifically remembers. He is testifying from the book, and what the book shows is one thing.

The Court: Put the book down. [303]

Read the question.

(The last question is read by the reporter.)

The Court: Do you know where he was?

The Witness: Yes, sir. I have records, Government records, given to the Government, sworn to, affidavits, that the man was working in the Navy Yard. The Government has got the records. [304]

\* \* \*

Q. Now, I am going to confine my questions, Mr. Ahearn, to the 10th day of March, 1952, and so, with reference to my questions, will you kindly confine your answers to that particular date? On March 10 of 1952, did you see at Bremerton, Washington, at your place of business, Mr. Upson of the Westinghouse Company and Mr. Novich of the Westinghouse Company or both of them?

The Court: Read the question.

(Testimony of John V. Ahearn, Sr.)

(The last question is read by the reporter.)

Mr. Lane: It is a leading question, your Honor, but I have no objection.

The Court: The objection is overruled, and I direct the witness to answer yes or no. [311]

A. Yes.

Q. (By Mr. Hoof): And which of the gentlemen did you see or did you see both of them, will you kindly answer that? A. Both of them.

Q. Now, will you tell me, sir, about what time of the day that was?

A. I live five miles out of town. I drove into town so I would imagine it would be around 9:00 o'clock, something like that, maybe between 9:00 and 10:00.

Q. That would be at what time of the day, morning or night? A. In the morning.

Q. Were Mr. Novich and Mr. Upson together?

A. Yes, they was together.

Q. Do you know, sir, what the purpose of Mr. Novich's trip to Bremerton was? A. Yes, sir.

Q. Will you state that purpose?

A. Mr. Pruitt of the Thrift Market, No. 1, in Bremerton, asked me to give a bid on changing the lighting at Fifth and Park and I asked Mr. Upson if he would have a lighting engineer come over and help me out and figure out on the lighting of that store.

Q. And will you state, Mr. Ahearn, what [312]

(Testimony of John V. Ahearn, Sr.)

the lighting consisted of that was to be done or bid upon?

A. The bid that I put in was on fluorescent lighting. It had incandescent lights in. The specified amount I don't know. I imagine it was around at least thirty fluorescent lights. The bid was something around——

Q. I did not ask you the amount of the bid, but I was trying to find out what type of lighting fixtures. A. Fluorescent.

Q. And how many of them, sir?

A. I would judge around thirty.

Q. Now, your testimony was that the lighting at that time was incandescent? A. Yes, sir.

Q. Did you do anything about Mr. Novich seeing the lighting job? In other words, did he see the store? A. Yes, sir.

Q. What did you do in that respect?

A. We went over there and we checked.

Q. Now, when you say "we," whom do you mean? A. Mr. Novich and myself.

Q. Where did you go?

A. To Fifth and Park, to the Thrift Market No. 1. [313]

Q. And what occurred there, sir?

A. We checked to see how many lights they would need or the amount—what they really needed for the store.

Q. And was such a computation made? I say, was such a computation made as to lighting?

A. Yes.

(Testimony of John V. Ahearn, Sr.)

Q. Then, at that time, sir, was Mr. Upson with you and Mr. Novich? A. No, he was not.

Q. Then, where did you and Mr. Novich go?

A. I went back to the shop.

Q. Who accompanied you, if anyone?

A. Mr. Novich.

Q. And what occurred in the shop?

A. Well, he gave me the figures on the amount of the lights, how much they would come to.

Q. And having determined that, what did you then do yourself?

A. I figured the cost of the lights. I figured the cost of the fixtures, figured the cost of labor, and then I went back to the store, to Mr. Pruitt, and I gave him a bid on the amount of the lighting it would cost him to put it in.

Q. Now, sir, on the 10th day of March, [314] 1952, and continuously from that point to this date, can you state whether or not the incandescent lamps have ever been replaced in the Thriftway Market?

A. No. They have never been replaced.

Q. Was your bid accepted or rejected?

A. It wasn't either accepted—or—well, it would have been rejected but it wasn't accepted.

Q. Now, either it was accepted or rejected.

A. It was never accepted yet.

Q. It has never been accepted?

A. It has never been finished.

Q. And your statement is that there has been no change in the lighting since March 10 in the Thrift Market? A. No change.

(Testimony of John V. Ahearn, Sr.)

Q. And was there any change immediately prior to that date?           A. No change. [315]

\* \* \*

The Court: Did you talk to them about anything relating to this contract that is the subject matter of this suit?

The Witness: No, sir.

\* \* \*

Q. Now, with reference to Mr. Upson, you stated that he and Mr. Novich came to your office or your place of business in the morning. Now, what happened insofar as Mr. Upson was concerned as to where he went or what he did, do you know, during that day?

A. Well, he has other places to call on, other people to call on, so he went to call on the other people. [316]

Q. Now, what kind of a headquarters, if any, did Mr. Upson have in Bremerton?

A. Well, he didn't have no headquarters at all, but he used to come to my place first whenever he would come in, and he would use the telephone, call up different places, and a lot of people at different times would call up and ask if Mr. Upson was there.

Q. Now, in the morning of March 10, 1952, when Mr. Novich and Mr. Upson were present in your office, and prior to the examination of the Thrift store for lighting fixtures, who were present at that time?

A. My wife was present. She came in with me



(Testimony of John V. Ahearn, Sr.)

from the country. She is the bookkeeper. Harry Adams, he was the one that opened up the store. Us three was there. Then Mr. Upson and Mr. Novich came in later.

Q. Now, was there anyone else present, sir?

A. None.

Q. Was Mr. Rockwell present at that time?

A. I couldn't say whether Mr. Rockwell was present or not. He could have been because he comes in and he was supposed to be in the Navy Yard at 8:00 o'clock.

Q. Now, in the morning when Mr. Novich and Mr. Upson were there, yourself, Mrs. Ahearn, Mr. Adams that you have testified to, and possibly Mr. Rockwell, which [317] you do not recollect whether he was present or not, was any discussion had whatsoever on the part of Mr. Rockwell with Mr. Upson in your presence or was any discussion had by you with Mr. Upson relative to a change in the type of wire, that is to say, from the paper-covered wire to the latex-covered wire?

A. None whatsoever. [318]

\* \* \*

Q. Did Mr. Upson discuss with you any lighting fixtures?

A. All I remember is that Mr. Upson came in there and said to me: "This is Mr. Novich. I brought him over on that lighting job." Then we went out on that job. There was no discussion made because I was with Mr. Novich. I spent about an

(Testimony of John V. Ahearn, Sr.)

hour and a half at least at the Thrift Market figuring out the lighting.

Q. Now, I am going to hand you what has been introduced into evidence as Defendant's Exhibit No. A-1, which has to do with an invoice from Westinghouse in connection with certain ruby fixtures. The typed order is dated the 11th day of March, 1952. The penciled attachments, I believe, are dated the 10th day of March, 1952. Now, can you tell me about that exhibit as to the fixtures and what purpose the fixtures were for?

A. Not to go through my records there, but on these ruby fixtures, that was for a private individual, these four ruby fixtures.

Q. And can you tell about that particular order that was placed through your company, for whose benefit [319] was it?

A. Mr. Upson asked me to get these ruby fixtures for this gentleman. I think he run some kind of a store in or around Bremerton. He wanted to buy them for him at a certain discount.

Q. Less than the price you would charge for them?

A. That is right.

Q. Did you accommodate Mr. Upson?

A. I did, and the man came a day or two later, and he picked them up and paid for them.

Q. Mr. Ahearn, when, if at any time, did you first learn about the price of latex-covered wire?

A. December 30, 1952.

Mr. Lane: What date was that?

Mr. Hoof: He said about December 30, 1952.

(Testimony of John V. Ahearn, Sr.)

The Witness: Or '53, from the invoice.

Q. (By Mr. Hoof): Now, that was an invoice from whom? A. From Westinghouse.

Q. I hand you what has been introduced in evidence as Plaintiff's Exhibit No. 16 and ask you if that is the invoice to which you are referring?

A. Yes, correct.

Q. Now, sir, at any time prior to that date [320] had you ever discussed with any representative, and particularly Mr. Upson of the Westinghouse Company, any change in the order of the wire which was originally ordered, that is to say, paper to latex?

A. No, I never discussed it with anybody.

Q. Did he, sir, ever discuss it with you?

The Court: I did not hear the answer.

A. No, sir.

Q. When was the invoice, which you have in your hand, dated—I believe December 30, 1952, received by you?

A. December 30 is when it was mailed. I received it about the next day, I guess. It takes about a day to come over.

Q. Well, in any event, when did you next have any contact with the Westinghouse Supply Company? A. When I received this.

The Court: What is this?

The Witness: When I received this invoice.

The Court: Does it have a number?

The Witness: No. 16.

Mr. Hoof: It is Plaintiff's Exhibit No. 16.

(Testimony of John V. Ahearn, Sr.)

A. When I received this invoice I figured [321] that it would be for \$1,800, the price, around \$1,800 there, the price that I figured in the first place for the paper-wrapped wire, and I seen it was \$7,646.29 and I said: "What the dickens? What happened here?" I got on the phone immediately there and called up the foreman, Mr. Rockwell. He was in the Navy Yard. And I told him he had better come out here and I read this to him over the phone and he came out right away.

The Court: Who is that?

The Witness: Mr. Rockwell, the foreman, and he came in the door and I showed him this. I said: "Rocky, did you order this?" He said: "No." Then I said: "How come this is this way?" He said: "Well, I will find out about that." And he got on the phone and he put in a long distance phone call to Mr. Flechsig. My wife was there, and my son was there, the young son who was in this courtroom the last two days, and he heard everything they said, and he said he never ordered it and he said: "What are you trying to pull off on that?" He was pretty mad about it.

Mr. Lane: Who was mad? I don't understand.

The Witness: Mr. Rockwell was.

Q. (By Mr. Hoof): Now, subsequent to that telephone call, what [322] further contact, if any, did you have with the Westinghouse Electric Supply Company, that is, after that telephone call?

A. I got in touch with Mr. Upson there.

Q. You got in touch with Mr. Upson?

A. Yes.

(Testimony of John V. Ahearn, Sr.)

Q. And how was that, please?

A. Well, he usually comes over. I call him up, but he usually comes over about three times a week. Whether he came over from my telephone or not—but I got in touch with him. No, he came over because he said—he——

Q. Now, just a minute. Before you say what was said, will you fix the approximate date of it, please, with reference to the call made by Mr. Rockwell?

A. I don't know just exactly what date it was. It was after I received this invoice and after we talked to Mr. Flechsig, after I received this and talked to Mr. Flechsig. It was that same week.

Q. Would that be in December or January?

A. I am pretty sure that it was—I think it was in December there. It was right after this.

Q. Would it be possible it would be the early part of January?

A. It could. It could have been in January. [323] It was the holidays then.

Q. And where did you see Mr. Upson?

A. He came over to the place of business.

Q. And what conversation was had between you and Mr. Upson at your place of business and who were present, please?

The Court: What was the date? What year, please?

The Witness: 1953.

Q. (By Mr. Hoof): By the way, who was pres-



(Testimony of John V. Ahearn, Sr.)

ent at that time when Mr. Upson came in response either to the call or his regular call, in any event? You were present, sir?      A. I was present, yes.

Q. Mr. Upson was present?      A. Yes.

Mr. Lane: Let the witness testify.

The Court: Objection sustained. If you can recall, say so, and if you cannot, kindly indicate and let us go on.

The Witness: I can't recall, sir.

Q. (By Mr. Hoof): Now, what conversation was had at that time with Mr. Upson relative to the wire?

A. Well, he says, he didn't say anything [324] about me ordering. That is one thing. I said: "There is an awful mistake."

The Court: That is not an answer to the question at all.

Q. (By Mr. Hoof): I want the conversation, please.

The Court: If you can recall it.

A. He said there: "We will try to straighten this out." He also said we ought to go to the Government, over to Pier 99 in Seattle, and maybe get an increased price on this wire. He said: "I will go over there with you."

The Court: Mr. Hoof, I assume you understand that the Court wants to know what was said regarding the change in the order of this cable, if anything was said, and I am really not too much concerned about what either one of them said about

(Testimony of John V. Ahearn, Sr.)

what else they might do after they found themselves in this trouble.

Mr. Hoof: I am aware of that, your Honor, and I am attempting to elicit that.

The Court: You may proceed.

Q. (By Mr. Hoof): Mr. Ahearn, what was said to you to Mr. Upson at that time with relation to the latex wire, and what [325] was said by Mr. Upson to you relative to the latex wire? I want you to confine yourself to that particular proposition, relative to ordering it or otherwise.

A. He didn't say anything.

Q. No, sir, but what did you say about ordering the wire? A. I said I didn't order that wire.

Q. And what did he say?

A. I guess he must have said: "I guess you did."

Q. What? A. He said I did.

Q. He claimed you did? A. Yes.

Q. And what did you say?

A. I said I did not.

Q. And then what happened?

A. Well, I said: "I won't accept it."

Q. You what? A. "I won't accept it."

Q. And what did he say?

A. He didn't have no answer to that. [326]

\* \* \*

Q. (By Mr. Hoof): Mr. Ahearn, what was the original completion date on the contract here involved? A. August, 1952.

(Testimony of John V. Ahearn, Sr.)

Q. And Mr. Ahearn, the contract was finally completed when, approximately?

A. February.

Q. Of what year, sir?

A. 1953, around the 20th, I believe.

Q. Now, subsequent to the meeting with Mr. Upson, I will ask you, sir, whether or not you had any meeting with Mr. Flechsig and Mr. Upson? Mr. Flechsig is the witness who testified as the supervisor of Mr. Upson? A. Yes.

Q. Now, can you tell me approximately when that was and where it took place?

A. It took place out at my residence, out in Route 2, Box 3172, Bremerton. [327]

\* \* \*

Q. I am handing you what has been marked, Mr. Ahearn, as Defendant's Exhibit No. A-5 for identification. Will you tell me what that is, please, if you know? A. It is A-5.

The Court: And what kind of a thing is it, if you know?

The Witness: It is discussing about latex cable.

Mr. Hoof: No. [331]

Q. (By Mr. Hoof): Let me phrase it for you for identification, please. Is that a letter from the Westinghouse Supply Company?

A. Yes, sir.

Q. And what is the date of the letter?

A. March 10, 1953.

Q. And it is addressed to you?

(Testimony of John V. Ahearn, Sr.)

A. To me, yes.

Q. At what address, please?

A. Route 6, Box 3172, Bremerton, Washington.

Q. And it is signed by whom?

A. Mr. Flechsig.

Q. Now, you received that, Mr. Ahearn, from Westinghouse?

A. I did, sir.

Q. And about when?

A. About March 11.

Q. Now, with reference to the two attachments to the letter, the first attachment, Mr. Ahearn——

The Court: Why do you not ask him, and then there will be no objection to that. If you will just ask him, Mr. Hoof——

Mr. Hoof: Yes, your Honor. [332]

Q. (By Mr. Hoof): Will you examine the first attachment to the letter, Mr. Ahearn?

A. (Examining Defendant's Exhibit No. A-5.) You mean in the back?

Q. The first attachment to the letter.

A. Yes.

Q. Now, will you state what that is, please?

A. It is the price of latex wire.

Q. And that is from whom? Can you tell me from the top?

A. United States Rubber Company.

Q. And addressed to whom?

A. Westinghouse Electric Supply.

Q. And that covers latex wire?

A. Yes, sir.

Q. Now, what date does that copy purport to bear?

A. It is February 18, 1952.

(Testimony of John V. Ahearn, Sr.)

Q. Yes, sir. Now, will you kindly look at the second attachment to the letter? A. Yes, sir.

Q. Now, what is that?

A. That is the amount of the latex wire.

Q. And what letterhead does it bear?

A. Westinghouse Supply Company. [333]

Q. To whom?

A. To Ahearn Electric Company, 826 Sixth Street, Bremerton, Washington.

Q. Now, Mr. Ahearn, I will ask you whether or not, prior to the 10th day of March, 1953, you ever received from the Westinghouse people copies of those documents that are attached to that letter or any documents resembling the same?

A. No, I did not.

The Court: I will be interested to know if any part of this Exhibit is in the nature of an invoice. I wish you would have the witness explain on proper interrogation what the difference is between the Exhibit and Plaintiff's Exhibit No. 16.

Mr. Lane: If your Honor please, I might state that the two attachments to this letter that counsel referred to are already in evidence as Exhibits.

The Court: What numbers?

Mr. Lane: One of them is Exhibit 7. That is the quotation from the United States Rubber Company and the other is Exhibit 11, I believe, which has not been admitted.

The Court: Plaintiff's Exhibit 11, rejected, is a typewritten copy of Exhibit 10 which is [334] admitted.



(Testimony of John V. Ahearn, Sr.)

Mr. Lane: Yes, your Honor.

Mr. Hoof: That is correct.

The Court: Do you wish to have——

Mr. Hoof: I will stipulate that they are the same.

The Court: Do you have any objection to the admission in evidence——

Mr. Lane: No, your Honor.

The Court: Then do you offer A-5?

Mr. Hoof: Yes, your Honor.

The Court: A-5 is now admitted.

\* \* \*

Q. I now hand you Plaintiff's Exhibit 5, which has been admitted into evidence——

The Court: You mean Defendant's Exhibit No. A-5 or Plaintiff's Exhibit No. 5?

Mr. Hoof: Plaintiff's Exhibit 5, your [335] Honor.

Q. (By Mr. Hoof): ——which has been admitted into evidence, and which is a carbon copy of the Westinghouse Supply Company order form, which Mr. Upson has testified was prepared by him. Now, does that, Mr. Ahearn, have any reference to latex cable?       A. No, sir.

Q. Handing you what you introduced in evidence as Plaintiff's Exhibit No. 7, being a quotation from United States Rubber Company to the Westinghouse Electric Supply Company, dated February 18 of 1952, I will ask you, sir, if that is not the same as a copy of the attachment to the letter

(Testimony of John V. Ahearn, Sr.)

from Westinghouse Supply Company to you, dated March 10 of 1953?

The Court: Read the question.

(The last question is read by the reporter.)

Q. (Continuing): —the latter having been referred to being marked as Defendant's Exhibit No. A-5? A. Yes, sir. It is exact.

Q. Your answer was yes? A. Yes, sir.

Q. And on or about February 18 or thereafter until the 10th day of March of 1953, sir, did you ever receive a copy of that? [336]

A. No, sir.

\* \* \*

Q. (By Mr. Hoof): In the spring of 1953, Mr. Ahearn, was any meeting held between yourself and Mr. Flechsig and Mr. Upson? A. Yes, sir.

Q. Can you tell me approximately when that was?

A. Somewhere in March. I don't know the exact date.

Q. And what year? A. 1953.

Q. And where did that take place?

A. At my residence, Route 6, Box 3172.

Q. What conversation was held between you and [337] Mr. Flechsig and Mr. Upson or between either of them and you with reference to the latex wire?

A. Well, I stated to Mr. Flechsig that I never ordered that, and he said: "You have a copy of this." I says: "I have not, never received a copy."

(Testimony of John V. Ahearn, Sr.)

So I took him to my files and I let Mr. Flechsig and Mr. Upson go through the files, all through the files. They were there nearly all day.

Q. Did they have dinner with you?

A. Yes.

The Court: What day was that that they went through your files at your invitation, as you just last stated?

The Witness: I can't state the date, sir.

The Court: What month? What year?

The Witness: In March, 1953.

The Court: You may inquire.

Q. (By Mr. Hoof): Now, was there any record found, sir? A. None whatsoever.

Q. Previously we have referred to Mr. Adams. Can you tell me whether Mr. Adams is now living or dead? A. He is dead.

Q. And can you tell me approximately when he died? [338]

A. Last—I think it was last year, the end of the year, something like that.

Q. Would the payroll records of your company show his employment? A. Yes, sir.

Q. Mr. Ahearn, in the deposition or testimony of Mr. Blackman there was testimony that the oven of an electric range was used in part as a file, as a filing cabinet. Will you explain that to me, [339] please?

\* \* \*

A. That was all, just at night. Can I explain?

(Testimony of John V. Ahearn, Sr.)

The Court: Did you use the oven of the stove for utility purposes?

The Witness: No, sir.

Q. (By Mr. Hoof): That was a new range?

A. Can I explain?

The Court: Yes.

A. Next door there is a fire hazard in the house, and the house, you don't know whether it is going to burn down or not. It is terrible. We fought about that for years, and we are always scared about having a fire over there. These records are important, so I put them in the range at night.

The Court: What was the range doing in your office?

The Witness: I was an electrical contractor, sir, and I sell electric ranges, and this was display.

The Court: Was a sample? [340]

The Witness: Sample, yes, sir.

The Court: You may inquire.

Q. (By Mr. Hoof): To shorten the matter up, Mr. Ahearn, in that respect, the oven of an electric range is insulated, is it not? A. Yes, sir.

Q. And that was the reason you used it at night?

A. Yes, sir.

Q. Now, I am going to hand you, Mr. Ahearn, an Exhibit which is marked Plaintiff's Exhibit No. 20, which has been admitted into evidence. The first attachment being a letter from the Ahearn Electric Company to the Officer in Charge of Construction, 13th Naval District, dated January 8, 1953, and in reply, a letter from the District Public Works

(Testimony of John V. Ahearn, Sr.)

Office, 13th Naval District, dated January 26, 1953, to Ahearn Electric Company. The entire Exhibit is Plaintiff's Exhibit No. 20. Now, the first attachment to the Exhibit, Mr. Ahearn——

A. (After examining the Exhibit.) Yes, sir. I have read the first attachment.

Q. That is a letter from yourself to the Navy Department? A. Yes, sir. [341]

Q. That letter, as I read it, was written subsequent to the time that the latex cable arrived on the job? A. Yes, sir.

Q. Then the letter dated January 26, 1953, a part of Exhibit 20, being the second attachment, from the Navy Department to yourself, is in reply to your letter, is it not? A. Yes, sir.

Q. And, Mr. Ahearn, if you will examine the Navy Department letter, you will find in part that the letter says, in substance, that the latex wire conforms to the specifications?

A. Yes, sir. [342]

\* \* \*

Q. I now refer you, Mr. Ahearn to [343] Plaintiff's No. 20, being your letter to the Navy Department that we have just referred to. Now, transmitted with your letter was what?

A. Transmitted with the letter?

Q. Yes. What did you send with your letter?

A. Oh, I sent the copy of Westinghouse sheet that they sent to me which I——

The Court: What was it? What was the nature of the information it contained?



(Testimony of John V. Ahearn, Sr.)

The Witness: Stating——

The Court: Was it a statement of your account on the basis of latex ordered or what was it?

The Witness: Stating——

Q. (By Mr. Hoof): I now hand you Plaintiff's Exhibit No. 16, being the billing from Westinghouse Electric Supply Company to you for latex wire, dated December 30, 1952.

The Witness (Continuing): ——stating the amount and the price of the latex wire.

Q. (By Mr. Hoof): Sir, did you or did you not send a copy of that billing to the Navy? [344]

A. I did, sir.

The Court: In your question, were you referring to Plaintiff's Exhibit 16?

Mr. Hoof: Plaintiff's Exhibit 16.

The Court: Let the record show that.

Q. (By Mr. Hoof): Was anything else included in your letter?

A. No, sir; just this one piece.

Q. Now, if you will refer, sir, to the letter of the Navy Department, which is the second portion of Exhibit 20, and I believe, if you will refer to the third paragraph on the first page, reference is made to transmission to the Navy Department of a letter by you dated February 19, 1952? A. Yes, sir.

Q. I now hand you what has been introduced in evidence as Plaintiff's Exhibit No. 6.

A. Yes, sir.

Q. Is that what is referred to in the Navy Department letter? A. It is, sir.

(Testimony of John V. Ahearn, Sr.)

The Court: What is the number? Do you know what it is?

The Witness: Yes, sir, I do. [345]

The Court: What is it?

The Witness: A copy from Westinghouse Electric to Ahearn Electric showing the amount of material, the shipping dates of that——

The Court: It is a copy of February 19, 1952, letter from Upson to you, is it not?

The Witness: Yes, sir.

\* \* \*

Q. (By Mr. Hoof): Mr. Ahearn, I now want to refer very briefly to the testimony of Mr. Blackman. Did you at any time, sir, have any difficulty of any kind with the Navy Yard or any inspectors in the Navy Yard relative to any drinking on your part? A. No, sir.

Q. Did you, sir, at any time have or bring any bottles of beer to employees of the Ahearn Electric Company working on this particular contract into the Yard for them to have at lunch?

A. No, sir.

Q. Did you, sir, ever at any time take any of your employees who were working on this contract from the Yard to have drinks or otherwise and then bring them back to the Yard? [346]

A. Absolutely not.

Q. Reference has been made to certain beer bottles by Mr. Blackman in the Officers' Quarters. In other words, they were presumably in a restroom,

(Testimony of John V. Ahearn, Sr.)

as I view the testimony. Do you know, sir, anything about that?

A. Yes, sir, I do. I heard about it.

Q. And what was the situation about that?

A. Mr. Rockwell told me that some of the men was using that lavatory up there and leaving beer bottles in there. Now, I don't know. Our men was using it, but I don't know anything about it. He told me that, and I didn't know anything about it.

Q. Did you ever hire or fire any men on the job?

A. Absolutely not. Mr. Rockwell had the complete charge in the Yard.

Q. And if any of the men employed by the Ahearn Electric Company were, in fact, violating any of the regulations of the Yard or were otherwise acting improperly as workmen, whose duty was it to reprimand them or discharge them or to take other appropriate action?

A. The foreman. Mr. Rockwell had absolute authority.

The Court: You might inquire, if you are [347] so minded, concerning the defendant Ahearn's sobriety on or about the March 10, 1952, date.

Mr. Hoof: Yes, your Honor. I will. I will come to that, sir.

Q. (By Mr. Hoof): Now, on or about March 10, 1952, Mr. Blackman has testified that you had on that date, and prior presumably to your meeting with Mr. Upson and Mr. Novich, two or three coffee royals. Is that true or false?

(Testimony of John V. Ahearn, Sr.)

A. That is false. [348]

\* \* \*

Q. Now, with reference to Mrs. Ahearn, from the time that you moved into the country, which you had previously testified was in the fall of 1951, what was the practice with reference to Mrs. Ahearn and yourself coming to town, that is, to Bremerton, to the place of [349] business?

A. I would come in, go to work. She would take care of the correspondence.

Q. No. What was the practice with reference to your coming to town? Would you come together or otherwise?

A. Oh, we had to come together in the car.

Q. And then during the course of the day, where would she be? A. She would be in the office.

Q. And where, sir, did you have your lunches?

A. At the office.

Q. And where were they made up?

A. At home.

Q. And you had luncheon together?

A. Yes, sir.

Q. Who had lunch together?

A. My wife and I.

Q. And at the end of the day, what was the practice with reference to returning home?

A. We would go home after.

Q. No. What was the practice? Did you go together? A. Yes.

Q. In your car? [350]

(Testimony of John V. Ahearn, Sr.)

A. In the car, yes, sir.

Q. Did you have more than one car?

A. Yes, but I didn't run the other car.

Q. Did Mrs. Ahearn run the other car?

A. No. My boy run it.

Q. Did your wife drive it?

A. No. She never drove his car.

Mr. Hoof: You may cross-examine.

### Cross-Examination

By Mr. Lane: [351]

\* \* \*

The Court: So am I. I think much of this witness' answers might have been not as clear as they might have been if he had better hearing. I think he has a very substantial impairment of hearing.

The Witness: I am trying to help. [352]

\* \* \*

Q. Did you or did you not testify, Mr. Ahearn, when you started testifying, that Mr. Upson came to your place of business on January 31, 1952, and brought you the quotation, which is Exhibit 3? Is that what you testified to? A. Yes, sir.

Q. And you are positive and certain of that date, are you? A. Yes, sir.

Q. And then, as I understand, you recalled that date because the next day you came to Seattle on the ferry and put your bid in at 2:00 o'clock?

A. Yes, sir. [353]

Q. Is that right? A. That is right.



(Testimony of John V. Ahearn, Sr.)

The Court: What time in the day? At 2:00 o'clock?

The Witness: In the afternoon.

Q. (By Mr. Lane): And at that time you had this quotation and you had had the previous conversation with Mr. Upson the day before when he handed you Exhibit 3, is that correct?

A. When he gave me the Exhibit, we figured out the price of the wire and the things that was lacking. I had to have that to place my bid.

Q. Mr. Upson handed this to you on January 31?

A. Yes, 31.

The Court: What is the nature of "this"?

Mr. Lane: The quotation.

The Witness: It is a quotation for the wire and for the other materials that went in there that was lacking.

The Court: What year?

The Witness: 1952.

The Court: January, 1952?

Mr. Lane: January 31, 1952, your Honor, and that is the date of this quotation also. [354]

The Court: Mr. Lane, for my convenience, do you hold in your hand and are you now referring to Plaintiff's Exhibit 3?

Mr. Lane: Yes, your Honor.

The Court: You may inquire.

Q. (By Mr. Lane): Now, this quotation, Mr. Ahearn, states that the cable in question, the paper-wrapped cable, could not be delivered until the third quarter of '53, does it not? A. Yes, sir.

(Testimony of John V. Ahearn, Sr.)

Q. And that was your recollection as to what that quotation stated at that time? A. Yes.

Q. Now, did you question Mr. Upson at that time as to whether or not that cable could be furnished earlier than that date?

A. He could furnish the cable within time.

Q. That is what Mr. Upson told you?

A. On time, yes. I made a statement at the time.

Q. Now, did that raise some question in your mind as to whether or not you should get that statement in writing?

A. No, sir. I will tell you the reason why. [355] I have been in business there since, oh, I will say '37 up to '52. I done business with Westinghouse, one of the biggest accounts that I had I gave to Westinghouse. I trusted them. When a man says he will deliver, I trusted their word, and we all do that, and if he could have delivered that on time, I took their word for it.

Q. You had been in the electrical business a long time, as you say? A. That is right.

Q. You knew the difference between the cost of latex and—— A. I did, sir.

Q. Latex cost about three times as much as the other wire? A. Yes, sir. [356]

\* \* \*

Q. When did you become first concerned with the delivery date of paper-wrapped wire? [360]

A. I never become concerned any time. I figured there that Westinghouse would fulfill what they

(Testimony of John V. Ahearn, Sr.)

told me they would do, and I never had doubted them. I just had to keep on writing them and ask for the delivery dates for the transformers for the wire and the fiber duct. Whenever I got the answer from them, I would ship this copy over to Pier 99, Seattle, to let them know when any of the materials was coming in.

Q. Now, then, you received Exhibit No. 6, which is the Westinghouse letter, dated February 19, 1952, did you not? You received that letter, as I recall?

A. Yes, I believe, yes, that is right.

Q. And that letter called your attention to the fact, did it not, that paper-wrapped cable could not be delivered until the third quarter of '53?

A. I seen that on there, yes.

Q. And it also called to your attention the fact that latex cable could be delivered in the third quarter of '52, did it not?

A. That is right.

Q. And did you pay any attention to that?

A. I didn't pay no attention to that. I sent it over to Pier 99 because I figured Westinghouse would fulfill their contract, because he stated there that he would get it on time there, and I didn't think anything [361] more about the wire.

Q. And you never had any further discussion?

A. I never had no more discussion about the wire, never entered my mind about the wire at all, or even the transformers.

Q. Why did you ask the Navy to approve it or why did you get their approval to use it?

A. That is one thing I never did do.

(Testimony of John V. Ahearn, Sr.)

Q. They gave you the approval to use latex?

A. I never asked for latex. Now, what I understand is, this Westinghouse must have called up Pier 99.

Q. Just tell me what you know about it.

A. Somebody called up there and asked for approval. I never asked for approval.

Q. Well, why, then, would you send the Westinghouse letter of February 19 over to the Navy?

A. Because I sent all copies over of what Westinghouse sent me, what had anything on about delivery dates.

Q. You just automatically——

A. Just automatic copy. That was all.

Q. Would it be possible that you sent over to the Navy the copies of your invoices covering latex that were sent to you? [362]

A. No. The last one I sent there when the bill came in. That is when I went over there.

Q. Is it possible that you might have sent the invoices over that were sent to you, Exhibits Nos. 10 and 11?

A. I only sent one invoice over to them. That was the invoice that I received on the price of the latex wire. That is the only one I sent over to them, invoice.

Q. Did you make an estimate for a draw for the Navy based upon the use of latex, as Mr. Rockwell testified to in his deposition?

A. I had to. That is the only way I could get the money. The amount what is on the grounds, the

(Testimony of John V. Ahearn, Sr.)

price, I have to prove the price, what is in [363] there.

\* \* \*

Q. Now, you say that at the meeting on March 10, 1952, you did not know whether or not Mr. Rockwell was present, is that right?

A. That is what I said. I can't recall whether he was present or not.

Q. You said that, at that meeting Mrs. Ahearn was there? A. Yes.

Q. And Mr. Adams? A. Yes.

Q. And you say there was no discussion whatsoever regarding latex?

A. That is right, no discussion at all. We didn't have to worry about it. Never even thought about latex.

Q. Was there any discussion at that time relative to the cable at all? A. None at all.

Q. All right. Let me ask you this question: Was there any discussion as to the change in the lengths of the cable on that date? [364]

A. No, sir, never brought to my attention, the lengths.

Q. You never had any discussion then with any representative of Westinghouse relative to the change in the lengths of the cable from the date you originally ordered it on February 5, '52, until after the cable arrived at your plant, is that your testimony?

A. Not me, personally, no. I didn't know the lengths. I absolutely did not know the lengths of the



(Testimony of John V. Ahearn, Sr.)

cable or anything that was ordered on that. Mr. Rockwell would give me the lengths and then send in for it and give the order.

Q. Your testimony is that you yourself had no discussion—— A. Pardon me?

Q. Your testimony is that you yourself had no discussion with the Westinghouse man relative to cable at all? A. No.

Q. From February 5——

A. Not the lengths, no.

The Court: Well, he asked anything relating to the subject of cable, not only lengths, but anything about the cable.

The Witness: There was some other cable [365] that was ordered.

The Court: He asked about your conversation.

The Witness: No, none at all.

The Court: You will have to try to make the witness understand. I have the impression that much of his difficulty and irresponsiveness is due to not hearing what is being asked. I may be wrong about that, but that is the impression I have been getting right along since he has been on the stand. Proceed.

Q. (By Mr. Lane): Do you know whether or not Mr. Rockwell had any discussion with any representative of Westinghouse relative to cable from February 5, 1952, until the latex cable was delivered?

A. Latex, you said? He stated to me that he didn't know anything about the change.

The Court: Does it concern you that he has said

(Testimony of John V. Ahearn, Sr.)

under oath something different from what you just said, Mr. Ahearn?

The Witness: Maybe I didn't quite understand the question. He stated "a cable" at first and then comes on with "latex."

The Court: The witness does not understand the question. [366]

The Witness: Not to me he doesn't state there is any difference about the latex cable.

The Court: Did Mr. Rockwell ever come to you or did you send for him, and as a result did he come to you, and did you and he have a talk about the circumstance of the substitution of latex for paper-covered cable?

The Witness: No, sir; no, sir. He never said a word to me.

Q. (By Mr. Lane): Was there any discussion between you and Mr. Rockwell as to the telephone cable at all between February 5, 1952, and the date it was delivered?      A. No, none at all.

Q. There was never any discussion at all?

A. No discussion between Mr. Rockwell and I.

The Court: Do you recall Mr. Rockwell, in discussing cable or substitution of latex cable with you, referring to your files to see if you could find a copy of any invoice or statement or contract or anything in your files relating to such substitution?

The Witness: He never said anything to me about any substitution.

The Court: Did he ever direct your [367] attention to your files and suggest that you look through

(Testimony of John V. Ahearn, Sr.)

your files and see if you could find any papers from the supplier, Westinghouse, relating to the substituted latex?

The Witness: No, sir.

Q. (By Mr. Lane): Mr. Ahearn, as I recall your testimony, when you had your meeting with Mr. Upson after the cable was delivered, Mr. Upson told you that you had ordered the cable and you said: "I did not"? A. Absolutely, I said that.

Q. That is right, and then he said: "We will try to straighten it out." I think those are your exact words, is that what he said?

A. Yes, that is right.

Q. And then you said: "I won't accept it." Is that correct?

A. I told him I wouldn't accept the cable, yes.

Q. Mr. Ahearn, I have asked you to produce all of your yellow sheets that you got from the Westinghouse on this job covering the material supplied for this job. I will refer now to Exhibit 14. Are those all of the—what are they called up at the top, Mr. Ahearn, please?

A. Acknowledgments. [368]

Q. Are those all of the acknowledgments that you have in your file?

A. That is all I can find, sir.

Mr. Lane: If your Honor please, I would now like to reoffer Exhibit 14 to show that it contains only a part of the materials which Westinghouse supplied on this job. That is the only purpose of offering it.

(Testimony of John V. Ahearn, Sr.)

The Court: I think it has been stated prior to this time that the same thing is attached to Defendant's Exhibit A-5 and is already received in evidence.

Mr. Lane: No, your Honor. These are the acknowledgments that are mailed by Westinghouse to the customer at the time the material is ordered, and my purpose in offering this is to show that it only covered a part of the material that Westinghouse supplied, and, therefore, it ties in with our theory of the case, that Mr. Ahearn's records were not well kept, and that he is only able to find, now find, a part of the acknowledgments that were sent to him.

The Court: Any objection?

Mr. Hoof: No. I have no objection.

Mr. Lane: That is the only purpose of it. [369]

The Court: As I understand, that is Plaintiff's Exhibit 11?

Mr. Lane: It is 14, I believe, is it not?

The Court: I do not know what it is.

Mr. Lane: It is a group of acknowledgments that were mailed by Westinghouse to Mr. Ahearn covering part of the material that was furnished on this Navy job.

The Court: Plaintiff's Exhibit 14 is now admitted.

(Plaintiff's Exhibit No. 14 received in [370] evidence.)

\* \* \*

(Testimony of John V. Ahearn, Sr.)

Q. Mr. Ahearn, I was not quite sure, as I understood your testimony, as to when you sold your shop known as the Ahearn Electric Company. Was that around the end of October, did you say?

A. The first of October.

Q. 1952? A. Yes.

Q. And the people that you sold it to were permitted to use the name "Ahearn Electric Company"? A. Yes, sir.

Q. And at that time you moved your office or your shop out to your home, is that my understanding?

A. I moved all the records out, moved everything. [372]

\* \* \*

The Court: Call the next witness.

Mr. Hoof: Mr. Flechsig.

The Court: Mr. Flechsig is now called as a witness on behalf of the defendant?

Mr. Hoof: Yes, your Honor. May the record show that he is called as an adverse witness?

The Court: That is what I was trying to bring out or give you an opportunity to bring out. If that is what you desire, the record will show that.



A. J. FLECHSIG

called as an adverse witness by and on behalf of defendant, having been previously sworn, was examined and testified as follows: [374]

Direct Examination

By Mr. Hoof:

\* \* \*

Q. And Mr. Flechsig, I am going to ask to have handed to you what is marked and introduced in evidence as Plaintiff's Exhibit No. 4, which is the original purchase order from the Ahearn Electric Company to the Westinghouse Company.

A. That is right, Mr. Hoof. I have it.

Q. And that Exhibit being the original order—or I shouldn't say the order, that, is it not, is a take-off of material for the purpose of submitting your quotation?

A. That is not the case.

Q. That is the purchase order?

A. That is right.

Q. I think you are correct on that, and that was drawn up, as the testimony shows, by Mr. Upson on Mr. Ahearn's stationery or paper at his office in Bremerton?

A. That is as I understand it. [375]

Q. Now, that appears to bear Mr. Ahearn's signature as the purchaser?

A. That is correct, so far as I know.

Q. Yes. Now, in your files or in the records of the Westinghouse Company, is there any other document relating to any of the materials on this job which bears the signature of Mr. Ahearn with ref-

(Testimony of A. J. Flechsig.)

erence either to purchase or to change orders or to anything of that kind?

A. To my knowledge, no.

Mr. Hoof: No further question.

Mr. Lane: I have no questions.

The Court: You may step down. [376]

\* \* \*

The Court: Mr. Bailiff, will you let Mr. Flechsig in his present position at counsel table look at that Exhibit 4, Plaintiff's Exhibit 4, and point out any words or figures thereon relating to the type of cable as indicating, if it does, the specification of the cable ordered, indicating whether, it was paper covered or latex covered?

(Plaintiff's Exhibit No. 4 is handed to Mr. Flechsig.)

Mr. Flechsig: Your Honor, on the fifth line, it reads: "1900 feet, 6 pair, 19 gauge, paper wrapped, lead covered, WE," which stands for Western Electric type, "ENB," and then, "1700 feet, 26 pair, ditto."

The Court: That means more of the paper covered?

Mr. Flechsig: Right. It means that the only difference between that second item and the item above is the number of pairs. Then the next line is, "1100 feet, 51 pair, ditto." After that it says, "one piece."

The Court: Is there anything said on that order about latex?

Mr. Flechsig: Your Honor, there is not.

The Court: You may proceed. Call the next witness. [377]

MRS. GOLDIE AHEARN

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hoof:

Q. Will you state your name, please?

A. Mrs. John Ahearn.

\* \* \*

Q. Mrs. Ahearn, you are the wife of John V. Ahearn, Sr., who is named as a defendant in this case, are you not? A. Yes, sir.

Q. And how long have you and Mr. Ahearn been married? A. Thirty-two years this June.

Q. Where do you live, Mrs. Ahearn?

A. At Route 6, Box 3172, Bremerton. [378]

\* \* \*

Q. Have you at any time worked in the office of the Ahearn Electric Company?

A. Yes, sir.

Q. And when, Mrs. Ahearn, did you work there? When did you start? A. The 1st of January.

Q. Of what year? A. Of '52.

Q. What, Mrs. Ahearn, did your work consist of?

A. Taking care of the offices and the customers and the books.

(Testimony of Mrs. Goldie Ahearn.)

Q. Were you acquainted with a Mr. Lawrence B. Blackman?      A. Yes, sir.

Q. Was he an employee of the Ahearn Electric Company?      A. Yes, sir.

Q. Now, from time to time, Mrs. Ahearn, [379] after you commenced work at the electric company in the month of January, as you have testified, in 1952, what office work from that date on, if any, did Mr. Blackman perform?

A. None at all,

The Court: Office work?

Mr. Hoof: Yes, sir.

A. (Continued): Just his own account, appliance account.

Q. Did he do any office work for the Ahearn Electric Company?      A. Definitely no.

The Court: What kind of work did he do with respect to his account?

The Witness: He repaired appliances.

The Court: He repaired——

The Witness: Appliances.

The Court: For whom?

The Witness: Any one that brought an out of order appliance in.

Q. (By Mr. Hoof): Now, to clarify the particular matter, Mrs. Ahearn, what were Mr. Blackman's arrangements with the Ahearn Electric Company?      A. To work on a percentage.

Q. As part of that, he has testified that [380] he maintained a little shop for rewinding of motors and armatures?

(Testimony of Mrs. Goldie Ahearn.)

A. Well, it was just a bench at one end of the shop.

Q. Well, now, with reference to his own books, you say that he took care of those on his own appliances? A. He took care of his own books.

Q. Now, from the early part or the first week of January of 1952, did he at any time do any typing for the Ahearn Electric Company as such?

A. No.

Q. Who did the typing? A. I did.

Q. Were you acquainted with an employee by the name of Mr. Adams? A. Yes, sir.

Q. And what was his employment with the Ahearn Electric Company?

A. He came and worked, took care of the shop, from 6:00 to 12:00 in the morning.

Q. What work did he perform?

A. He answered telephone calls and waited on the customers. [381]

\* \* \*

Q. Handing you what has been marked for identification as Defendant's Exhibit No. A-6, that being what is marked on the outside of the cover "Weekly Time Book," now, will you state what that is, if you please?

A. That is the time book the rest of the men have, and they kept their own time in it, and then I checked from this.

The Court: What persons are included in your phrase "the rest of the men"?



(Testimony of Mrs. Goldie Ahearn.)

The Witness: Any one who did work for us.

The Court: Anyone other than your husband working for the defendant Ahearn Electric Company?

The Witness: Yes.

The Court: Is that what you mean?

The Witness: Yes, sir.

Q. (By Mr. Hoof): And did each of the several employees in the company have their own time book? A. Those who worked in the shop.

Q. Had their own time books? A. Yes.

Q. And with reference to Exhibit No. A-6, being the time book, whose time book is that, please?

A. Mr. Adams. [383]

Q. I will ask you whether or not that is a book of original entry? A. It is.

Q. And by whom was the book made? I am not speaking about the purchase, but I am speaking about the entries in the book.

A. Mr. Adams made his own entries.

Q. And then what was done with the entries that he made?

A. I checked them and gave him his check from that book.

Q. Now, what, Mrs. Ahearn, does the book show with reference to Mr. Adams' employment—

The Court: You cannot ask what it contains because it is not in evidence yet. I understand there is no objection, but you have not offered it.

Mr. Hoof: I should like to offer it.

(Testimony of Mrs. Goldie Ahearn.)

The Court: Defendants' Exhibit A-6 is now admitted.

(Defendants' Exhibit No. A-6 received in evidence.)

The Court: Now, you can ask her what is in it. [384]

Q. (By Mr. Hoof): Mrs. Ahearn, what does the book show with reference to Mr. Adams' employment on the date of March 10, 1952?

A. That he put in four hours.

The Court: March 10, 1952, is that right?

The Witness: Yes, sir.

Q. (By Mr. Hoof): He worked what?

A. Four hours.

The Court: Can you tell from that what time of day he worked?

The Witness: He always quit at 12:00.

The Court: That was the four hours from 8:00 to 12:00?

The Witness: Yes, sir.

Q. (By Mr. Hoof): And now would you kindly examine Defendants' Exhibit A-7, which appears to be a check to Mr. Adams?

A. Yes, sir. I have it.

Q. Will you state what that is?

A. That is the check for that week's pay, and he bought——

The Court: Is it pay for that work done [385] by Mr. Adams on March 10, 1952?

(Testimony of Mrs. Goldie Ahearn.)

The Witness: No, for that week, for the week of the 10th to the 15th.

The Court: Does it or does it not include March 10, 1952?

The Witness: Yes, sir.

Q. (By Mr. Hoof): And did he receive his full pay for the week less purchases made from the firm? A. Yes.

Q. And the purchases made from the firm are likewise shown in the book? A. Yes.

Mr. Hoof: I offer Defendants' Exhibit A-7.

The Court: Admitted.

(Defendants' Exhibit A-7 received in evidence.)

The Clerk: Defendants' Exhibit A-8.

(Cash Journal marked Defendants' Exhibit A-8 for identification.) [386]

\* \* \*

Q. Handing you for identification, Mrs. Ahearn, what has been marked as Defendants' Exhibit A-8, will you kindly state what that is?

A. That is the cash book we started the [387] first of the year 1952, and it is being used up to the present date.

Q. Mrs. Ahearn, when you say "we," are you referring to the Ahearn Electric Company?

A. Well, it is Forest Electric now.

Q. But in '52—— A. Yes.

(Testimony of Mrs. Goldie Ahearn.)

Q. But in '52, it was Ahearn Electric Company?

A. Yes.

Q. Will you examine the book and advise me whether I am correct in the dates I advised the Court that it covers, namely the period from January 5, 1952, through April of 1954?

A. That is right, yes. Now, we have so little—it is June 2nd. You didn't see that probably down below. We are doing practically nothing now. It is June 2, 1954, is the last date of entry in the cash book. [388]

\* \* \*

Q. Mrs. Ahearn, during the year of 1952, where was that book, being Exhibit A-8, kept?

A. It was kept in the shop at all times.

Q. That is the Ahearn Electric Company?

A. Yes.

Q. And by whom are the entries made in the book during the period from January 5, 1952, through the period of, let us say, up until March of 1953?

A. Some are made by me and some by my husband, and I see a few here by my son.

Q. By the way, is that a book that has to do with other than cash?

A. It is credit, credit accounts, too.

Q. Credit accounts, too?           A. Yes.

Q. And what, Mrs. Ahearn, was the practice with reference to the book as to entries being made on the dates that entries were to be made, in other words, [389] when an event occurred?

(Testimony of Mrs. Goldie Ahearn.)

A. When the people came in, the entry was made at that time, and if the checks came in, they were entered that same day.

\* \* \*

(Defendants' Exhibit No. A-8 received in evidence.)

The Court: Now you can read any word in it or any figure in it or any page or anything else that counsel wishes read. Page 5 was referred to in the last question.

A. I have seven entries on the 10th of [390] customers, credit customers.

The Court: That is not clear in my mind. Read the question.

(The last question is read by the reporter as follows: "Q. What does that show with reference to the date of March 10, 1952, as to who made the entries"?)

Q. (By Mr. Hoof): Who made the entries?

A. I did.

Q. On what date were they made?

A. March 10th.

Q. By yourself? A. Yes, sir.

Q. Now, Mrs. Ahearn, on March 10, 1952, where were you on that date?

A. I was in the shop. I came in with my husband in the morning like we always do.

Q. And how long during the day did you remain there? A. Remained all during the day.



(Testimony of Mrs. Goldie Ahearn.)

Q. Did you or did you not see Mr. Upson and Mr. Novich at the shop on that day?

A. I remember meeting Mr. Novich that day, yes. [391]

\* \* \*

Q. Do you know at the time that Mr. Novich and Mr. Upson arrived whether or not Mr. Rockwell was present?

A. That I can't remember. I don't recall that.

Q. Do you know whether a Mr. Blackman, an employee, was present?

A. No. He was not.

Q. And where was he?

A. He was in the Navy Yard that day.

Q. On the 10th day of March, 1952, was Mr. Blackman at any time in the shop?

A. Not until evening. [392]

\* \* \*

Q. Now, if you will carefully listen. Were any of the materials necessary or required to perform the Navy Yard contract ever stored at your address of 608—or whatever it was—where the shop was and the office [394] was, were any materials for the Navy Yard contract ever stored there?

A. No, sir.

Q. Can you tell me whether any work other than office work relative to the performance of the Navy Yard contract was ever done at the office or in your storage facility adjacent to the office for materials?

A. No, sir.

(Testimony of Mrs. Goldie Ahearn.)

Q. Where were the materials for the performance of the Navy Yard contract delivered, if you know?

A. To the shack in the Navy Yard. We called it—it is what they call it—the shack. It was his office in the Navy Yard. We constructed the building ourselves.

Q. For storage facilities down there?

A. Yes.

Q. Now, Mr. Blackman, Mrs. Ahearn referred to using an oven of a stove for the keeping of records. Would you explain that, please?

A. The house on the other side of the shop had had two fires in just a short time, and I was concerned about having some more trouble, so I started putting the records in the electric range because it was insulated and it was porcelain, and I figured if there was a fire, at least we would have our records, which was [395] the most important.

Q. That was a new range? A. Yes, sir.

Q. Not one that was used to cook on?

A. Never had been hooked up, no.

Q. And what time of the day, Mrs. Ahearn, did you put the records there, if there was a time of day?

A. Well, sometimes we didn't get away until 6:00 or 7:00 o'clock in the evening, but whenever we left, that was the last thing I did, was put my records away.

The Court: I think he was asking, with reference to day or night, was there any difference when

(Testimony of Mrs. Goldie Ahearn.)

the receptacle in question was used for storage or safekeeping of records.

The Witness: Just at night.

Q. (By Mr. Hoof): On March 10, 1952, Mrs. Ahearn, where were you during such periods of time as Mr. Upson and Mr. Novich were in the office of the Ahearn Electric Company in Bremerton?

A. I was at my desk.

Q. And would that be in the same room or another room than that in which they were present?

A. Right behind the counter, in the same [396] room.

Q. Did you at any time hear any comment with reference to latex wire?

A. No, sir. [397]

\* \* \*

Q. Mrs. Ahearn, on one of my first questions to you, I asked you when you moved from Bremerton into the country.

A. 1951.

Q. Now, one moment please. Your answer to my question was "In the fall of 1952." Now was that a correct or an incorrect answer?

A. That was when we sold the store. We moved a year previous to that, in 1951, October 1. [407]

\* \* \*

Q. Now, from and after the time that you moved to the Route 6 address, did you at any time live in the house adjacent to the shop?

A. No, sir.

Q. Or have you ever lived there since the fall

(Testimony of Mrs. Goldie Ahearn.)

of 1951?           A. No, sir. [408]

\* \* \*

Mr. Hoof: May I offer Defendant's Exhibit A-9, being the pay check of Mr. Blackman?

The Court: Let Mr. Lane see it.

Mr. Lane: Oh, I have no objection.

The Court: Defendant's Exhibit No. A-9 is admitted, the defendant's case in chief being opened up for that purpose only. [414]

\* \* \*

### MERRITT UPSON

called as a rebuttal witness by and on behalf of plaintiff, having been previously sworn, was examined and testified as follows: [417]

\* \* \*

### Redirect Examination

(Continued)

By Mr. Lane:

Q. Mr. Upson, you heard Mr. Ahearn's testimony that you were in his place of business on January 31, 1952, at which time you presented to him the quotation which is Exhibit No. 3, did you not?           A. I did.

Q. And were you there at his office on that date?

A. No, sir.

Q. Do you know where you were on that date?

A. Port Angeles, Washington.

The Clerk: This will be Plaintiff's Exhibit No. 21.

(Testimony of Merritt Upson.)

(Expense Account marked Plaintiff's Exhibit No. 21 for identification.)

The Court: If that material has a name, [422] will you please assign it, counsel?

Mr. Lane: This, your Honor, is an expense account of the witness, Mr. Upson, covering the period January 25, 1952, to February 22, 1952.

Mr. Hoof: What is the number of that exhibit?

The Court: Plaintiff's No. 21.

Q. (By Mr. Lane): Mr. Upson, I show you what has been marked Plaintiff's Exhibit 21 and ask you to state what that is, please, if you know?

A. That is my expense account for the month between the dates of January 25, 1952, and February 22, 1952.

Q. And will you tell the Court how that expense account is kept and made up and when it is made, please?

A. Each day I make a running account of the expenses or moneys I have spent that day in pencil, and at the end of the period, when I have to turn this in, I rewrite it on this form. [423] (Indicating.)

\* \* \*

Mr. Hoof: Do I understand, Mr. Upson—I don't mean to delay this—but is each one of the documents prepared by you in your own handwriting?

The Witness: Yes, sir.



(Testimony of Merritt Upson.)

The Court: Plaintiff's Exhibits 21 and 22 are now admitted.

(Plaintiff's Exhibit No. 21 received in evidence.)

(Plaintiff's Exhibit No. 22 received in evidence.)

Q. (By Mr. Lane): Mr. Upson, would you look at both of those exhibits, 21 and 22, and tell the Court what they show with reference to where you were, what you spent on the [427] days of January 30 and January 31, 1952?

A. On January 30, I was at Port Angeles, Washington. The room was \$4.12. Meals were \$3.35, I believe. Telegraph and telephone, etc., \$1.15. Entertainment, \$3.35. A total of \$11.97.

Q. That is which day now?

A. That is January 30, 1952.

Q. Then where were you on the 31st?

A. The 31st I was in Port Angeles. I have no room that day, because that is the day I came home for a meeting that evening, but I do have meals in here at \$2.65. Entertainment, which would be lunch in this case, \$1.50. That makes a total of \$4.35. Then ferry fare, \$2.63.

Q. Now, which ferry fare is that? Which ferry did you take?

A. That would be the ferry from South Point to Lofall; Kingston to Edmonds. That is two separate ferries.

(Testimony of Merritt Upson.)

Q. Yes. Is that the ferry you took coming home that day?           A. Yes, sir.

Q. And you went directly home?

A. Yes, sir.

Q. Now, there is a bill there showing your [428] hotel bill that you paid in Port Angeles?

A. Yes, sir.

Q. That is attached to which exhibit?

A. 21.

Q. That is the last sheet on Exhibit 21, is that right?           A. Yes.

Q. Now, the evening of January 31, 1952, what did you do?

A. I attended a Westinghouse production show in the New Washington Hotel.

Q. And how do you know that you did that on that date?

A. Because when this was coming up, invitations were mailed to different contractors and men who would be interested in this particular show, and I had three gentlemen from Port Angeles that came down.

Q. And how do you know that that was the day, Mr. Upson? Is there anything in your expense account to show that?

A. Yes. On January 31, 1952, I show "Seattle" and "Production Ahead" meeting it was called, expenses \$5.85.

Mr. Lane: That is all, Mr. Upson.

Mr. Hoof: I have one question. [429]

(Testimony of Merritt Upson.)

Recross-Examination

By Mr. Hoof:

Q. Is there any doubt in your mind, Mr. Upson, but what prior to the time the bid was made by the Ahearn Electric for the particular job in question that you discussed the matter with Mr. Ahearn? There is no question about that? A. No, sir.

Q. You did discuss it? A. I did not.

Q. Never discussed it? A. No, sir.

Q. Did you discuss it with Mr. Rockwell?

A. No, sir.

The Court: What date is it in January that you claimed you were in Port Angeles instead of in Bremerton?

The Witness: January 31, 1952.

The Court: Did you phone Mr. Ahearn on that day?

The Witness: No, sir.

The Court: Did you, in your previous testimony, say that you did?

The Witness: To the best of my knowledge [430] I didn't in my testimony.

\* \* \*

Q. (By Mr. Hoof): I would like, Mr. Upson, to refer you to your pre-trial deposition on page 4.

The Court: I would like for you to expedite this matter.

Mr. Hoof: Well, this will be my last question, your Honor.

(Testimony of Merritt Upson.)

The Court: Both sides may have to submit it without argument if you do not hurry along.

Q. (By Mr. Hoof): I am now referring to your pre-trial deposition on page 4, line 6. I will ask you whether or not, Mr. Upson, the following questions were asked and in answer to the questions you gave the answers which I will read:

“Q. I say: When did you first contact Mr. Ahearn or when did Mr. Ahearn contact you with reference to the work that was finally performed under this contract? [431]

“A. I don’t recall whether he contacted me or our office for a quotation on this particular job which was coming up.

“Q. Do you recall when you were first contacted, one way or the other, however it may have been? A. On this particular job?

“Q. Yes.

“A. No, I don’t recall whether I delivered the bids or whether I mailed them. Sometimes you deliver the bids and sometimes they go out in the mail.

“Q. You were contacted either directly or indirectly by the Ahearn Electric Company prior to the bidding, were you not? A. Yes.

“Q. A list of required materials to perform the bid was taken off of the invitation, was it not?

“A. That is right.

“Q. Did you participate in taking that off?

“A. Did I?

“Q. Yes. A. In this particular bid?

(Testimony of Merritt Upson.)

“Q. Yes. [432]            A. No.”

Were those your questions and your answers given?

A. The one you refer to—I don’t know the number of it—I think it was about—That is my deposition. Is that what you were asking, if that was in my deposition?

Q. Yes, the questions that I asked and the answers that you gave, that is correct?

A. Yes, sir.

Mr. Hoof: No further questions. [433]

\* \* \*

#### A. J. FLECHSIG

called as a rebuttal witness by and on behalf of  
amined and testified as follows:

#### Direct Examination

By Mr. Lane:

Q. Exhibit 14 is what, Mr. Flechsig?

A. Exhibit 14 is a group of acknowledgments on direct shipment tickets.

Q. To whom?

A. The top one is Ahearn Electric.

Q. And that covers material on this Navy job, does it? All of those cover material on the Navy job? [434]

A. From having previously examined them, yes.

Q. Now, in relation to Exhibit 14, have you had



(Testimony of A. J. Flechsig.)

occasion just lately to check that with your copy of the ledger account that is admitted in evidence?

A. I did hurriedly check it; yes, sir, I did.

Q. Now, how many of those order acknowledgments are contained in Exhibit 14 out of the total number on this Navy job?

A. From my quick check, eight. If I may refer to my notes (referring to notes), this list covers eight, and ten are not included.

Q. In other words, there are ten of those missing from that group covering the job at Bremerton, is that right? A. That is correct.

Mr. Lane: That is all.

### Cross-Examination

By Mr. Hoof:

Q. How many sheets are there there in that exhibit, Mr. Flechsig? There are some 15 sheets are there?

A. That is right. I would have to count them but there are more sheets than there are ticket numbers. [435]

Q. And have you compared those with the list of materials itself that were furnished?

A. Have I compared this——

Q. Exhibit 14, the acknowledgments, with the list of materials furnished, to check off against Exhibit 14 the actual materials furnished by the Westinghouse?

(Testimony of A. J. Flechsig.)

A. Mr. Hoof, that I have not. There is only one of them that I know from memory, and that is the top one. If you mean this list does not include the item of telephone wire, which is in question——

Q. No. We have already agreed upon that, Mr. Flechsig, that it does not include the telephone wire, but what I understand is that you merely made a hasty run-down on those acknowledgments against the job account sheet which has been introduced in evidence, as distinguished from checking the materials listed on the acknowledgments against the materials that were actually furnished by your company. I except, however, from my statement the matter of telephone wire which we agree is not included in there. Am I correct on that?

A. You are correct on that. [436]

\* \* \*

### Certificate

I, Frances I. Gilligan, Official Court Reporter in and for the within-entitled Court, hereby certify that the foregoing is a full, true and correct transcript transcribed from my Stenograph notes by me or under my direction, to the best of my knowledge, and that any and all omissions from the transcript have been parenthetically noted.

/s/ FRANCES I. GILLIGAN,  
Official Court Reporter.

[Endorsed]: Filed September 2, 1954. [443]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith the following original documents and papers in the file dealing with the above-entitled cause, being all thereof, including Plaintiff Exhibits 1 to 22 incl., and Deft. A-1 to A-9, incl., as the record on appeal from the Judgment of Dismissal with Prejudice filed Aug. 2, 1954, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed Nov. 10, 1953.
2. Praecipe for summons, filed Nov. 10, 1953.—  
(Deft. Ahearn, Sr.)
3. Marshal's Return on Summons, filed Nov. 20, 1953.
4. Marshal's Return on Summons, Aetna Cas. & Surety Co., et al., filed Nov. 30, 1953.
5. Appearance of Deft. Aetna Cas. & Surety Co., filed Dec. 8, 1953.
6. Appearance of John V. Ahearn, Sr., filed Dec. 8, 1953.

7. Answer of Defendants, filed Jan. 28, 1954.
8. Praecipe, Ptff. for subpoena, Rockwell, filed June 7, 1954.
9. Praecipe, Ptff. for subpoenas, John V. Ahearn, Sr., et al., filed June 10, 1954.
10. Deposition of John V. Ahearn, filed June 16, 1954.
11. Deposition of Merritt Upson, filed June 16, 1954.
12. Deposition of Edward Novich, filed June 16, 1954.
13. Deposition of Arthur L. Rockwell, filed June 16, 1954.
14. Deposition of Lawrence B. Blackman, filed June 16, 1954.
15. Motion for Order Amending Complaint, filed June 16, 1954.
16. Notice of Presentation of Motion, filed June 16, 1954.
17. Trial Memorandum of Plaintiff, filed June 16, 1954.
18. Marshal's Return on Subpoena, Ahearn, Sr., filed June 16, 1954.
19. Marshal's Return on Subpoena, Hoof, filed June 16, 1954.
20. Plaintiff's Supplemental Trial Brief, filed June 18, 1954.
21. Motion Ptff. for Reconsideration of Oral Decision and Alternative Motion for New Trial, filed June 23, 1954.
22. Court Reporter's Transcript of Court's Oral Decision, filed June 29, 1954.

23. Memorandum in Support of Plaintiff's Motion for Reconsideration, filed July 1, 1954.

24. Defendants' Memorandum re Implied Contract, filed July 1, 1954.

25. Plaintiff's Objections to Defendants' Proposed Findings of Fact, and Conclusions of Law, and Plaintiff's Proposed Changes Thereto, filed July 1, 1954.

26. Plaintiff's Objections and Proposed Changes in Defendants' Proposed Findings of Fact and Conclusions of Law, filed Aug. 2, 1954.

27. Order Denying Motion for Reconsideration of Oral Decision and Denying Motion for New Trial, filed Aug. 2, 1954.

28. Findings of Fact and Conclusions of Law, filed Aug. 2, 1954.

29. Judgment of Dismissal with Prejudice, filed Aug. 2, 1954.

30. Notice of Appeal by plaintiff, filed Aug. 30, 1954.

31. Bond for Costs on Appeal (Ind. Ins. Co. of N.A.), filed Aug. 30, 1954.

32. Court Reporter's Transcript of Proceedings at Trial, filed Sept. 2, 1954.

33. Designation of Contents of Record on Appeal, filed Sept. 24, 1954.

34. Statement of Points by Appellant, filed Sept. 24, 1954.

35. Stip. and Order for Transmission of Original Exhibits, filed Sept. 24, 1954.

I further certify that the following is a true and correct statement of all expenses, costs, fees and



charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit:

Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by counsel for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 30th day of Sept., 1954.

[Seal]      MILLARD P. THOMAS,  
Clerk,

By /s/ TRUMAN EGGER,  
Chief Deputy.

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[Endorsed]: No. 14537. United States Court of Appeals for the Ninth Circuit. United States of America for the Use of Westinghouse Electric Supply Company, a Corporation, Appellant, vs. John V. Ahearn, Sr., an Individual Doing Business Under the Firm Name and Style of Ahearn Electric Company and The Aetna Casualty and Surety Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 4, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14537

UNITED STATES OF AMERICA, for the Use of  
Westinghouse Electric Supply Company, a  
Corporation, and all Similarly Situated,

Appellant,

vs.

JOHN V. AHEARN, SR., an Individual Doing  
Business Under the Firm Name and Style of  
Ahearn Electric Company, and THE AETNA  
CASUALTY AND SURETY COMPANY, a  
Corporation,

Appellees.

### APPLICATION RE EXHIBITS

Comes Now the Appellant and makes application to this Honorable Court for an order granting permission to have this court consider the exhibits designated as a part of the record in the above-entitled appeal in the original form, without the same being reproduced and printed as a part of the record on appeal.

This application is based upon a stipulation between counsel for all parties in this appeal, agreeing to the entry of such an order.

EVANS, McLAREN, LANE,  
POWELL & BEEKS,

/s/ W. BYRON LANE,

/s/ MARTIN P. DETELS, JR.,  
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 5, 1954.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 14537

UNITED STATES OF AMERICA, for the Use of  
Westinghouse Electric Supply Company, a  
Corporation, and All Similarly Situated,  
Appellant,

vs.

JOHN V. AHEARN, SR., an Individual Doing  
Business Under the Firm Name and Style of  
Ahearn Electric Company, and THE AETNA  
CASUALTY AND SURETY COMPANY, a  
Corporation,  
Appellees.

### STIPULATION

It Is Hereby Agreed and Stipulated by and between the parties to the above-entitled appeal, by and through their respective counsel of record, that the exhibits designated as a part of the record by each party in this appeal, may be considered by the court in their original form, and that the same

need not be printed as a part of the record on appeal.

Dated this 23rd day of September, 1954.

EVANS, McLAREN, LANE,  
POWELL & BEEKS,

By /s/ W. BYRON LANE,  
Attorneys for Appellant.

HILE, HOOF, SHUCKLIN and  
MERRILL WALLACE,

By /s/ CLIFFORD HOOF,  
Attorneys for Appellees.

[Endorsed]: Filed October 5, 1954.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-  
TION OF CONTENTS OF RECORD ON AP-  
PEAL

Pursuant to the provisions of Rule 17 (6), Rules of Practice of United States Court of Appeals for the Ninth Circuit, the appellant, Westinghouse Electric Supply Company, files herein its statement of points and designation of contents of record on appeal, and adopts and by reference incorporates herein its statement of points and designation of contents of record on appeal previously served and filed and appearing in the typewritten transcript of the record on appeal filed in the office of the Clerk of the above-entitled Court.

EVANS, McLAREN, LANE,  
POWELL & BEEKS,

/s/ W. BYRON LANE,

/s/ M. PAUL DETELS, JR.,  
Attorneys for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed October 9, 1954.